TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 278

R. H. HASSLER, INC., PLAINTIFF IN ERROR,

vs.

DAVID C. SHAW

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, TRANSFERRED FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

FILED FEBRUARY 14, 1925

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INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 11, 1925

[fol. 1] [Caption omitted]

THE STATE OF SOUTH CAROLINA:

IN COURT OF COMMON PLEAS OF SUMTER COUNTY

DAVID C. SHAW, Plaintiff,

vs.

ROBERT H. HASSLER, INC., and COLUMBIA COMPRESS COMPANY, Defendants

The Plaintiff above named, complaining of the Defendants herein, alleges:

[fol. 2] I. That plaintiff is a resident and citizen of the County of Sumter, State of South Carolina; that the defendant, Robert H. Hassler, Inc., is a foreign corporation, incorporated, so plaintiff is informed and believes, under the laws of the State of Indiana, with its principal place of business in Indianapolis in said State, and now has property within the State of South Carolina, as hereinafter set forth; that the defendant, Columbia Cotton Compress Company, is a corporation organized and existing under the laws of the State of South Carolina.

II. That the defendant, Robert H. Hassler, Inc., is a large corporation engaged in the manufacture and sale of a certain accessory, known as the Hassler Shock Absorber, for use on Ford automobiles; that for the purpose of distributing and selling its product, it employs State distributors, through whom all of its products going into the State must pass, to be distributed in turn to the consumer through local agents; that the plaintiff is largely interested in the sale of automobiles, and conducts several sales and accessory establishments.

III. That sometime in the latter part of August, 1918, plaintiff went to Indianapolis, Indiana, to the offices of the defendant, Robert H. Hassler, Inc., for the purpose of arranging to become State Distributor for the said Shock absorbers in the State of South Carolina and after some negotiation, agreed with the said defendant that plaintiff should be said State Distributor for said State, and should have charge of the sale and distribution of said shock absorbers, and should receive a profit of two and 50/100 dollars for each set of shock absorbers sold in said state, that is to say, that the said defendant agreed and bound itself to sell said shock absorbers for distribution in said State exclusively to the plaintiff, at such a price that upon resale, the plaintiff should receive the said profit.

IV. That under and by the terms of said agreement, plaintiff was to advertise the said shock absorbers and push their sale in every way, in order to do which, plaintiff would have to incur considerable expense, that in view of this fact, plaintiff advised the said defendant

[fol. 3] that he would not enter into such contract unless he could retain it for a sufficient period of time to make it worth his while, for the reason that, after working up a large sale for said shock absorbers, plaintiff did not purpose to have the distribution of same taken away from him; that thereupon the said defendant, through its agents, agreed that plaintiff should retain such distributorship from year to year for at least five years, and so long as he continued to actively push the sale of said absorbers.

V. That a written contract was then entered into by and between the parties which did not contain the terms of said agreement in this respect, and shortly after his return to South Carolina, plaintiff wrote to defendant, and again stated that he would not care to go into the distribution of said shock absorbers unless he could retain the right to distribute the same from year to year as aforesaid, and in reply to this letter, the said defendant advised plaintiff that under his contract, it was determinable at any time upon thirty days' notice; that this was the standard form of contract, and the same that said defendant made with its other State Distributors.

VI. That shortly after receiving this letter, plaintiff went again to Indianapolis, and again took the matter up with said defendant, and stated that he would not go on with said distribution, and would not continue to buy shock absorbers from said defendant with such a provision in his contract, or under any other contract than that originally agreed upon verbally between them, to-wit, that plaintiff should have the exclusive sale of said shock absorbers in South Carolina, and the exclusive right to buy them from said defendant, from year to year for at least five years, and for so long as plaintiff should actively continue to push the sale of said absorbers; that thereupon the said defendant, through its agents as aforesaid agreed with the plaintiff, in view of his statements; that their original verbal agreement should stand, and that said letter and written contract would not control, and that the said plaintiff should have the exclusive right to buy said shock absorbers from said defendant in South Carolina and the exclusive right to sell them in South Carolina, from year to year for at least five years, and for so long as plaintiff should actively [fol. 4] continue to push the sale of said absorbers, it being further understood and agreed that the provisions of said written contract not inconsistent with said agreement should stand.

VII. That the plaintiff thereupon returned to South Carolina and commenced actively to advertise the said shock absorbers, and to push their sale in every proper and possible way, in doing which plaintiff incurred considerable expense; all with the knowledge and acquiescence of the said defendant; that plaintiff purchased a considerable number of said shock absorbers from the said defendant, organized and established local distributors through the State, and did and performed such other things as was necessary to establish a new product in the trade in South Carolina.

VIII. That in pursuance, with said contract, the said defendant shipped to Columbia, South Carolina, a car load of said shock ab-

sorbers, the same being now in the hands of the defendant, Columbia Cotton Compress Company, and on or about the 23d day of April, 1919, the defendant, Robert H. Hassler, Inc., without previous notice to plaintiff, and in utter disregard of plaintiff's rights under his contract, unlawfully attempted to cancel and terminate plaintiff's contract as aforesaid, and, so plaintiff is informed and believes, instructed and warned the said Columbia Cotton Compress Company, which is engaged in a storage business, not to turn said shock absorbers over to plaintiff, and that the said Columbia Cotton Compress Company still retains possession of said shock absorbers, which are still the property of the defendant, Robt. H. Hassler, Inc., and refuses to turn the same over to plaintiff, although Plaintiff is ready, willing and anxious to pay therefor.

IX. That the said Columbia Cotton Compress Company has been advised by plaintiff that the said Robt. H. Hassler, Inc., was without right or warrant in its attempted cancellation of plaintiff's contract, and that the plaintiff still has the exclusive right and privilege to purchase said shock absorbers from the defendant, Robt. H. Hassler, Inc., but the said defendant, Columbia Cotton Compress Company, refuses to recognize plaintiff's rights, and refuses to permit him to [fol. 5] purchase said shock absorbers, by, with, and under instructions from the defendant, Robt. H. Hassler, Inc.

X. That the defendant, Robt. H. Hassler, Inc., has refused to sell shock absorbers to plaintiff and refused to recognize said contract.

XI. That said car load of shock absorbers was placed in the hands of the Columbia Cotton Compress Company under an agreement between plaintiff and the defendant that the defendant should turn the same over to plaintiff upon payment of the purchase price therefor; that plaintiff is ready, willing and anxious to pay for said shock absorbers, and has offered so to do, but the defendants have failed and refused to turn over said shock absorbers, and have failed and refused to accept payment therefor, and have breached plaintiff's contract.

XII. Plaintiff further alleges that the business of distributing said shock absorbers is a profitable one; and that in South Carolina it would have been especially profitable to plaintiff by reason of the extensive advertisement given by him to the said shock absorbers, and by reason of the further fact that plaintiff had placed numerous local agents therefor, and that the acts of the said defendant in breaching said contract have resulted to plaintiff's damage in the sum of One hundred and seventy-five thousand dollars.

Wherefore, plaintiff prays judgment against the defendants for the sum of one hundred and seventy-five thousand dollars.

L. D. Jennings, A. S. Harby, Attorneys for Plaintiff.

Sworn to by D. C. Shaw. Jurat omitted in printing.

[fol. 6] In Court of Common Pleas of Sumter County.

[Title omitted]

Summons—Filed May 5, 1919

To the defendant above named:

You are hereby summoned and required to answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your Answer to the said Complaint on the subscriber at his office in Sumter, S. C., within twenty days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, the plaintiff in this action [fol. 7] will apply to the Court for the relief demanded in the complaint.

Dated May 3, A. D., 1919.

L. D. Jennings, Plaintiff's Attorney. H. L. Scarborough, C. C. C. P.

In Court of Common Pleas of Sumter County

[Title omitted]

Return of Service—Filed July 23, 1924

Frank C. Brosius, being duly sworn, says that he served the summons and verified complaint in this action on the defendant, Robert H. Hassler, Inc., a corporation, by delivering to Ed. W. Springer, the treasurer of said corporation personally and leaving with him copies of the same at the place of business of said Robert H. Hassler, Inc., at Indianapolis, Ind., on the 12th day of May, A. D., 1919, and that he knows the person so served to be the one mentioned and described in the summons and verified complaint, as Robert H. Hassler, Inc., defendant therein, and the deponent is not a party to the action.

Frank C. Brosius.

Sworn to before me, this 14th day of May, A. D., 1919. James F. Cleary, Notary Public. My commission expires March 20, 1922. (Seal.)

[fol. 8] Return of Service—Filed July 23, 1924

[Title omitted]

J. C. McCain, being duly sworn, says that he served the summons and complaint, attachment bond and warrant of attachment in this action on the defendant, Columbia Cotton Compress Com-

pany, a corporation, by delivering to Frank M. Jeffords, the Superintendent of said Company and leaving with him copies of the same at Columbia, South Carolina, on the 5th day of May, A. D., 1919, and that he knows the person so served to be the one mentioned and described in the aforesaid documents, as Columbia Cotton Compress Company therein, and the deponent is not a party to the action.

John C. McCain.

Sworn to before me this — day of May, A. D., 1919. T. A. Heise, Notary Public for S. C. (Seal.)

In Court of Common Pleas of Sumter County

[Title omitted]

Notice to Dismiss and Set Aside Alleged Service of Summons

Exhibit "A"

[fol. 9] To Messrs, L. D. Jennings, A. S. Harby and John A. Clifton, Plaintiff's Attorneys:

Please Take Notice that the undersigned appear specially herein on behalf of Robert H. Hassler, Inc., Defendant, as their Attorneys, for the purpose and only for the purpose of moving to dismiss and set aside the alleged service of the summons herein upon the said Robert H. Hassler, Inc., and shall move the Hon. John S. Wilson, Circuit Judge of the Third Judicial Circuit, at his Chambers, in Manning, S. C., at noon or as soon thereafter as counsel can be heard, on Friday, the 30th day of May, 1919, to set aside the service of the said summons herein, for want of jurisdiction, upon the ground that the said Robert H. Hassler, Inc., is a foreign corporation, and that it has no Agent or Officer or other person residing in this State, or within the jurisdiction of this State after the 2nd day of May, 1919, and that the property of Robert H. Hassler, Inc.; and that the said Robert H. Hassler, Inc., does not appear generally in this action, but expressly restricts its appearance to the purpose of moving to set aside service of the summons for said want of jurisdiction.

You will further take Notice that this motion so made under said restricted appearance shall be made upon the affidavits of Edward W. Springer and Thomas B. Davis, copies of which are herewith served upon you, and upon the record in the above stated case.

Rutledge and Hyde, Attorneys for Robt. H. Hassler, Inc., appearing specially as above set forth.

In Court of Common Pleas of Sumter County

Answer—Filed September 3, 1919

The defendant, Robert H. Hassler, Inc., in answer to the complaint herein, alleges:

For a First Defense

I. That on the 24 day of May, 1919, it entered a special appearance in this action, for the purpose of moving to set aside the service [fol. 10] of the summons herein upon this defendant, upon the grounds that will more fully appear in the copy of Notice hereto attached, and made a part of this Answer, and marked "Exhibit A," and that after notice duly served upon the Plaintiff's attorneys, a motion was made on the 30th day of May, 1919, to set aside the service of summons upon this defendant, on the grounds stated in the copy of notice hereto attached, before the Honorable John S. Wilson, Judge of the Third Circuit, and that the said Judge refused to grant the said motion by an Order filed herein on the 31st day of May, 1919, a copy of which is hereto attached and marked "Exhibit B" and hereby made a part of this Answer, wherein and whereby, he expressly reserved the right to the defendant to set up such special defense in its Answer as to the jurisdiction of the Court as it may deem advisable.

II. That this Court has no jurisdiction over the Defendant, because at the time of the beginning of this action, it was, and is now, a foreign corporation, to-wit, a corporation organized under the laws of the State of Indiana; that it has never been domesticated within this State, and it then had not, and has not now either offices or officers within this State, and it does not do business herein. That on the third day of May, 1919, it had no property within the State of South Carolina upon which attachment could be legally levied so as to give this Court jurisdiction of this defendant, as is required by the Statute law of this State in such case made and provided.

For a Second Defense

Further answering the complaint, and reserving its right to object to, and not waiving its right under the Plea to the Jurisdiction as alleged in the first defense above set forth, this Defendant alleges:

I. That it admits the allegations of the first paragraph thereof, save and except that it had property within the State of South Carolina on the third day of May, 1919, which allegation it specifically denies.

II. That it admits the allegations of the second paragraph thereof [fol. 11] except that "it employs state distributors through whom all of its product going into the state must pass to be distributed in turn to the consumer through local agents;" which it denies

and avers the fact to be that its business practice is to enter into a written contract agreeing to sell to a jobber, denominated "General Distributor" who is granted the exclusive right to buy and sell Hassler shock-absorbers in a particular territory a specified quantity of shock-absorbers at a specified price, who in turn sells said shock-absorbers to retail dealers. That such jobbers are designated as "General Distributors" but are in no sense agents of the defendant and occupy no other relation to the defendant than that of vendor and vendee, and defendant denies that at any time it ever employed any agent known as "State Distributor" in the State of South Carolina.

III. That it admits so much of the allegations of the third paragraph thereof as avers that in the latter part of August, 1918, plaintiff went to Indianapolis, Indiana, to the offices of the defendant, Robert H. Hassler, Inc., for the purpose of arranging to become general distributor for the said shock-absorbers in the State of South Carolina and denies all of the other allegations of said Third Paragraph, and avers the fact to be that after negotiations upon the occasion of the visit of the plaintiff to the office of the defendant in August, 1918, and after subsequent negotiations, the plaintiff and the defendant entered into a written contract, a copy of which is hereto attached, marked "Exhibit C."

IV. It denies the remaining allegations contained in the remaining paragraphs save and except as is hereinafter admitted.

V. Further Answering, this Defendant alleges that on or about the 23rd day of August, 1918, it did, after negotiations duly had for some time prior thereto, enter into a contract for the sale of shock-absorbers to the said plaintiff, which contract was reduced to writing, and signed by the parties thereto, a copy of which contract is hereto attached and made a part of this Answer, and marked "Exhibit C," and that the said contract embodied and crystal-ized all of the terms of the contract as agreed upon by and between the parties thereto.

[fol. 12] VI. That on or about the eleventh day of January, 1919, in accordance with the said contract, and the instructions of the said Plaintiff herein, this Defendant shipped to the order of Robert H. Hassler, Inc., Order Notify the said D. C. Shaw, or Columbia Sales Agency, one (1) carload of shock-absorbers, and drew upon the said Columbia Sales Agency or D. C. Shaw through a bank in Columbia, with the said order notify bill-of-lading attached, for the purchase money thereof.

VII. That the defendant does not know the date of the arrival of said carload of shock-absorbers at Columbia, South Carolina, but is informed and believes that the said carload of shock-absorbers arrived at its destination sometime prior to the seventh day of February, 1919, and that the said Plaintiff was notified in accordance with the terms of the said bill-of-lading, and refused to pay the said draft drawn against the said shipment and to accept the said

carload of shock-absorbers and pay for the same. That the said carload of shock-absorbers remained on the track at Columbia, S. C., until some time after March 14th, 1919. That the said draft and bill-of-lading was returned to this defendant, and the said bill-of-lading by it, on the 14th day of March, 1919, was sent to the J. N. Finley Transfer Company of Columbia, S. C., with orders and directions to the said J. N. Finley Company to secure the goods and put them in storage for the account of the said Robert H. Hassler, Inc.

VIII. That thereafter, the said J. N. Finley, notified this Defendant that in accordance with its instructions, the car of shock-absorbers had been received and placed in a warehouse for their account, and thereupon this Defendant paid the freight, storage and demurrage charges thereon.

IX. That the plaintiff having failed to pay for the said carload of shock-absorbers, this Defendant, under and by virtue of the terms of its contract with the Plaintiff, cancelled the said contract on the 23rd of April, 1919, as will appear by copy of letter written to said Plaintiff upon that day, hereto attached, made a part of this Answer, and marked "Exhibit D."

[fol. 13] X. That thereafter, to-wit: on the 24th day of April, 1919, this Defendant sold and delivered the said carload of shock-absorbers in custody of said Finley at Columbia, S. C., to the Hassler Sales Agency, a corporation organized and existing under the laws of the State of Virginia, for the sum of Nine thousand six hundred twenty-two and 55/100 Dollars ($9,622.55), and on said day delivered to Indiana National Bank of Indianapolis, Indiana, a draft drawn on said Hassler Sales Agency for said sum and attached thereto an order upon said J. N. Finley to deliver said goods to the said Hassler Sales Agency, and an invoice of said goods to be delivered to said Hassler Sales Agency upon payment of said draft. That on May 2, 1919, the said Hassler Sales Agency at Richmond, Virginia, paid said draft and received said written order and invoice.

XI. That neither the Defendant, Robert H. Hassler, Inc., nor any stockholder, director, officer or any third person for the benefit of them or either of them, on said 24th day of April, 1919, or since, was or is, the holder or owner of any of the shares of the capital stock of said Hassler Sales Agency, or had or has any interest of any kind therein.

XII. That this Defendant denies that there was any agreement whatsoever made by and between the Plaintiff, the Columbia Cotton Compress Company, and this Defendant that the said carload so placed in storage in the said Columbia Compress Company's warehouse was subject to be delivered to the said Plaintiff upon his paying for same, and denies further that it had any knowledge that the said shock-absorbers were in the possession of the said Compress Company, prior to the commencement of this action.

And Having Fully Answered, Defendants prays that the Complaint be dismissed as against it, with its costs.

Rutledge & Hyde, Attorneys for Robert H. Hassler, Inc

[fol. 14] Sworn to by Edward W. Springer. Jurat omitted in printing.

EXHIBIT "B." TO ANSWER

THE STATE OF SOUTH CAROLINA,
Sumter County:

COURT OF COMMON PLEAS

DAVID C. SHAW, Plaintiff,

vs.

ROBERT H. HASSLER, INC., et al., Defendants

Order

This matter comes before me on motion to set aside the service on the defendant, Robert H. Hassler, Inc., upon the grounds stated in the moving papers. Plaintiff opposed the motion, and offered certain counter-affidavits.

After hearing argument and giving the matter due consideration.

It is Ordered, That said motion be, and the same hereby is, refused, without prejudice, however, to the right of defendant to set up such special defense in its Answer as to the jurisdiction of the Court as it may deem advisable.

(Signed) John S. Wilson, Judge Third Circuit.

Manning, S. C., May 31, 1919.

[fol. 15] EXHIBIT "C." TO ANSWER

No. —

General Distributor's Contract

Agreement made this 23rd day of August, 1918, by and between D. C. Shaw of Columbia, S. C., hereinafter called the Distributor, and Robert H. Hassler, Inc., of Indianapolis, Indiana, hereinafter called the Seller.

The Seller hereby appoints the Distributor D. C. Shaw Distributing Agent, except as hereinafter specified, for Hassler Shock Absorbers for Ford cars, during the term of this agreement, within the following territory, to-wit: State of South Carolina.

First. The Seller agrees to sell and deliver, F. O. B. Seller's Factory, to the Distributor, and the Distributor agrees to purchase from the Seller, the following merchandise, to-wit: Five thousand (5,000) complete sets of Hassler shock absorbers, and it is hereby agreed that these said Shock Absorbers shall be taken at the rate of not less than see shipping schedule per month, from the date hereof.

As a part of this agreement, the Distributor shall accept from the Seller and Manufacturer see shipping schedule complete sets, the minimum specified quantity of Shock Absorbers each month from the date hereof as they are made ready for the market by the Seller and Manufacturer.

Second. The Distributor shall pay for said Shock Absorbers as follows:

(a) The minimum general Distributor's price is established by the Seller or Manufacturer for the period of time during which this contract is in force.

(b) F. O. B. Seller's or Manufacturer's Factory or Warehouse.

(c) Draft attached to Bill of Lading, collection charges added, unless other terms are definitely *ar*anged, specified and duly executed in writing over the signatures of all parties specified in this contract.

[fol. 16] (d) It is hereby agreed that the Distributor will pay Six Per cent (6%) interest on the total sums of all Drafts which are not paid by the Distributor within Ten (10) Days after the arrival of all shipments. It is further hereby agreed that the failure of the Distributor to pay any Draft within thirty days of the date thereof, is due and sufficient cause for the Seller or Manufacturer to cancel this contract without notice and without recourse whatsoever by the Distributor upon the Seller or Manufacturer.

Third. The Seller hereby authorizes the Distributor to have returned to the Seller's or Manufacturer's Factory at Indianapolis, Indiana, all carriage charges prepaid, any Shock Absorbers, or parts, that may be returned to him by his customers, within twelve months from the date of shipment thereof, on account of material or workmanship being claimed defective, and the Seller shall in turn replace and deliver such Shock Absorbers or Parts, carriage charges prepaid, refunding the return carriage charges paid by the customer, if upon inspection at the Seller's Factory, such Shock Absorbers or Parts are found defective in manufacture, as claimed.

Fourth. It is hereby agreed that in the event of a shortage or error in shipment occurs, the customer is to notify the Seller or Manufacturer immediately on opening the original box or container, returning the packing slip sent with the shipment, and that if such error is not immediately reported to the Seller or Manufacturer as specified, no adjustment of such claim is to be made by the Seller or -anufacturer to the Distributor.

Fifth. The Seller represents and guarantees that the Seller is the owner of the Patents and Trade Marks under which said Hassler Shock Absorbers are manufactured, or is otherwise legally entitled to manufacture and sell the same, and that the Distributor, his Agents

or Customers incur no liability of any kind through the purchase, sale or exchange of the said Shock Absorbers. The Seller furthermore agrees and guarantees to defend said product, at the Seller's cost and expense, and the Distributor from all claims, actions, suits or other proceedings which may be brought against the Distributor [fol. 17] upon the ground that said Hassler Shock Absorbers are infringing on the patent rights of others, upon condition, however, that the Distributor shall immediately notify the Seller and permit the Seller to defend against such claims, actions, suits or proceedings and to have sole charge and control thereof through attorneys and counsel employed by the Seller.

Sixth. It is hereby agreed that in the event of war, strikes, fire, delays or casualties beyond the control of the Seller, delivery of merchandise herein ordered, by the Seller may be delayed or suspended in whole or in part, the Seller to make deliveries with due diligence in the premises, it being understood that the specified monthly deliveries to the Distributor would be suspended during such a period.

Seventh. In consideration of the exclusive selling arrangement granted the Distributor, by Seller, by this contract, the Distributor hereby contracts to co-operate with the Seller or Manufacturer in the marketing of Hassler Shock Absorbers as follows:

(a) To employ — Specialty Salesmen and have them devote their best efforts and entire time selling Hassler Shock Absorbers within the territory specified in this contract.

(b) To co-operate with and increase the efficiency of said Salesmen, by helpful instructions at all times and by having them profit by the instructions, helps and advice that may be given them from time to time by the Seller or Manufacturer.

(c) To establish a Headquarters or Office where all mail, etc., will be received promptly by the Distributor.

(d) To give prompt reply to all mail received from the Seller or Manufacturer and from present or prospective customers within or outside of the territory specified in this contract.

(e) To forward promptly to the Seller or Manufacturer, all mail [fol. 18] received from present or prospective customers from outside of the territory specified in this contract.

(f) To not fill any orders for Hassler Shock Absorbers received from or to be delivered to any place outside of the territory specified in this contract, and to forward promptly to the Seller or Manufacturer, for proper handling, all orders received from or to be delivered to any place outside of the Distributor's specified territory.

Eight. The Distributor hereby agrees to have all Dealers and Agents who handle or sell Hassler Shock Absorbers within the territory specified in this contract to place Hassler Shock Absorbers on all prospective customers' Ford cars for ten days' free trial, such Dealers or Agents to properly install (put on and take off the Shock Absorbers) and without charge to the prospective customers, in the event the Shock Absorbers are not purchased at the end of such trial period.

Ninth. The Distributor hereby agrees not to sell Hassler Shock Absorbers to Mail Order Houses or to any Jobbers or Wholesalers, or to anyone other than recognized Retail Dealers, except it be to individuals who in turn will sell the same only to individual owners of Ford cars and for their own use.

Tenth. The Distributor hereby further agrees to have all Dealers and Agents sign regular Dealers and Agents Contract (such contract forms to be furnished the Distributor by the Seller or Manufacturer), and furnish to the Seller or Manufacturer copies of all such contracts promptly as made, to complete their records and to make it possible for the Seller or Manufacturer to co-operate to the fullest extent with all Dealers and Agents everywhere.

Eleventh. The Distributor hereby agrees not to sell or to directly or indirectly influence in any way, the sale of any Shock Absorber for Ford cars other than Hassler's, or to give any information or advice whatsoever to any other Manufacturer, or Competitor of the Seller or Manufacturer during the period of this contract.

[fol. 19] Twelfth. It is hereby mutually agreed and understood by the Distributor that his contract is not transferable, and that there are no verbal arrangements or understanding other than specified herein between the Distributor and the Seller or Manufacturer.

Thirteenth. It is hereby mutually agreed that any violation of any of the conditions of this contract by the Distributor makes it optional with the Seller or Manufacturer to cancel this contract without notice and without any recourse whatsoever by the Distributor upon the Seller or Manufacturer.

Fourteenth. It is hereby further understood and agreed that in the event the Distributor does not enter into and co-operate enthusiastically with the Selling, Advertising, Merchandising, etc., plans of the Seller or Manufacturer, it is optional with the Seller or Manufacturer to cancel this contract without notice and without recourse whatsoever by the Distributor upon the Seller or Manufacturer.

Fifteenth. It is hereby mutually agreed that this contract may be cancelled by the Seller or Manufacturer giving the Distributor thirty days' notice, such notice to be in writing and mailed by the Seller to the Distributor at his regular address, the Seller or Manufacturer purchasing from the Distributor whatever new and perfect Hassler Shock Absorbers and Repair Parts that are then in the possession of the Distributor, paying the Distributor therefor, the same price he paid the Seller or Manufacturer, for the same, plus the freight paid by the Distributor on the same, it being understood that such Shock Absorbers or Repair Parts are to be immediately delivered by the Distributor to the Seller or Manufacturer.

Sixteenth. It is agreed that all the terms, conditions, provisions, requirements and obligations of this contract shall extend to and

be binding upon and enure to the benefit of each of the parties to this contract, for the period from September 1, 1918, to June 30, 1919.

[fol. 20] In witness whereof, D. C. Shaw subscribed his name hereunto and the Robert H. Hassler, Inc., has caused this writing to be executed under the authority of the proper action of his Board of Directors by Robert H. Hassler, its President, the day and year first above wirtten.

(Signed) D. C. Shaw. Robert H. Hassler, Inc., by ——
—— President.

In the presence of —— ——.
(Read carefully before signing.)

EXHIBIT "D," TO ANSWER

Copy

April 23, 1919.

Columbia Sales Agency, Columbia, S. C.

Attention Mr. D. C. Shaw

DEAR SIR: The writer just returned to the office this morning, after a week's absence, and finds your wires asking us to send our draft covering the car of Hasslers that you promised us you would take during the month of January, through the bank of Columbia.

We have made other arrangements for the distribution of Hasslers in South Carolina. Your failure to take this car of Hasslers in January, when you promised us you would, and your unsatisfactory cooperation, together with the results you have shown in comparison with our other general distributors, have prompted us to take this action, and as above stated, we have arranged for other distribution.

We do not feel that you can blame us in the least for your failure to realize what an opportunity you let get away from you.

[fol. 21] We notice in our files your signature on one of our general distributor's contracts, but as you will remember, you would not sign a shipping schedule. Therefore this contract is not in force. However, should you be of a different opinion, you will, in consideration of Articles 14 and 15 in this general distributor's contract, take this letter as definite cancellation thereof, and advise us immediately the total number of complete, new and perfect sets of Hassler Shock Absorbers and repair parts that are in your possession, whereupon we will take them off your hands at the price you paid us for them, plus the freight to your point of distribution.

Thanking you, we are

Very truly yours, Robert H. Hassler, Inc., Sales Manager.

EDF:SS.

Exhibit duplicated taken out.

IN UNITED STATES DISTRICT COURT

NOTICE OF MOTION TO AMEND ANSWER—Filed February 21, 1921

To Messrs. Jennings & Harby and John A. Clifton, Plaintiff's Attorneys:

Please Take Notice That on Monday, the 7th day of February, 1921, at 12:00 o'clock noon, or as soon thereafter as counsel can be heard, we shall move the Honorable Henry A. M. Smith, U. S. District Judge, at his Chambers in the City of Charleston, for an Order permitting the Defendant, Robert H. Hassler, Inc., to amend its Answer by adding to paragraph IV of the Second Defense the following words:

And further answering the said paragraphs of the complaint, and especially paragraphs IV and V thereof, this defendant alleges that the alleged agreement referred to in said paragraphs IV and V for an extension of the term of the written contract, alleged in the complaint, was a parol, executory agreement not to be performed within a year from the making thereof, and this defendant is advised and so alleges that under the Statute in such case made and [fol. 22] provided, such an agreement should be in writing, signed by the parties to be charged, and this defendant alleges that the said alleged agreement, for such extension is void and of no effect; and that the plaintiff can recover nothing thereunder in this action.

Rutledge, Hyde & Mann, Attorneys for Defendant, Robert H. Hassler, Inc.

Service accepted February 4, 1921.

Jennings and Harby, Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT

DAVID C. SHAW, Plaintiff,

vs.

ROBERT H. HASSLER, INC., AND COLUMBIA COMPRESS COMPANY, Defendants

EX PARTE HASSLER SALES AGENCY, INC.

ORDER TO AMEND COMPLAINT AND ANSWER—Filed 21 February, 1921

This matter has come on to be heard upon an application on behalf of the defendant, Robert H. Hassler, Inc., to amend its answer by setting up the plea that the contract alleged was oral and void under the terms of the Statute of Frauds. Counsel on behalf of both plaintiff and defendant have appeared and been heard and after consideration of the same, It is

Ordered, under all the circumstances of the case, that the plaintiff have twenty days from the date of this order in which to amend his complaint, as he may be advised, so as to set up any matters of performance or value received, or any other matters, charging and alleging any plan, intention or device on the part of the defendant to cheat, mislead or defraud the plaintiff, as would operate to create [fol. 23] an action in behalf of the plaintiff on such grounds or remove any objection or defense by means of the Statute of Frauds; and that within the time aforesaid a complete copy of the verified complaint so amended be served upon the attorneys for the defendant. It is further

Ordered, That the defendant, Robert H. Hassler, Inc., shall have twenty days after such service in which to file an amended answer to such amended complaint, controverting any such allegations as may be made by the plaintiff therein, and in addition thereto, setting up any defense it may desire, resulting from the provisions of the Statute of Frauds; and that a copy of the same, verified, be served within the time aforesaid, upon the attorneys for the plaintiff. It is further

Ordered, That the plaintiff have ten days after such service in which to file any reply he may desire to any matter or matters constituting new matter or an affirmative defense or counter-claim, that may be introduced in the answer of the defendant; and that after all the same be filed, the action shall stand upon the docket for trial at the next term of this Court in Columbia.

Henry A. M. Smith, U. S. District Judge.

In United States District Court

[Title omitted]

Amended Complaint—Filed March 14, 1921

The plaintiff above named, by his amended complaint, complaining of the defendants herein, alleges:

1. That plaintiff is a resident and citizen of the county of Sumter, [fol. 24] State of South Carolina; that the defendant, Robert H. Hassler, Inc., is a foreign corporation, incorporated, so the plaintiff is informed and believes, under the laws of the State of Indiana, with its principal place of business in Indianapolis, in said State, and, at the time of the commencement of this action, had property within the State of South Carolina, as hereinafter set forth, and was doing business therein; that the defendant, Columbia Compress Company, is a corporation, organized and existing under the laws of the State of South Carolina.

2. That the defendant, Robert H. Hassler, Inc., is a large corporation engaged in the manufacture and sale of a certain accessory,

known as the Hassler Shock Absorber, for use on Ford automobiles; that for the purpose of distributing and selling its product, it employs State distributors, through whom all of its product going into the State must pass, to be distributed in turn to the consumer through local agents of the said defendant Hassler; that in order for one to perform the duties of such distributor, it is necessary that the defendant Hassler furnish him from time to time with an adequate supply of Hassler Shock Absorbers to meet the demand therefor, created by such distributor, and such local agents that the plaintiff is largely interested in the sale of automobiles and conducts several sales and accessory establishments.

3. That sometime in the latter part of August, 1918, plaintiff went to Indianapolis, Indiana, at the solicitation and request of the defendant Hassler, for the purpose of arranging to become distributor for said shock absorbers in the State of South Carolina, and, after some negotiation, agreed with the said defendant that plaintiff should be State Distributor for said shock absorbers, and should receive a profit of at least two and 50/100 dollars for each set of shock absorbers sold in said State; that it to say, that the defendant bound itself to sell said shock absorbers for distribution in said State exclusively to the said plaintiff, at such a price that upon re-sale, the plaintiff should receive the said profit, and agreed that the plaintiff should have the right to obtain an adequate supply of such shock absorbers to enable him to perform the duties of such distributorship.

[fol. 25] 4. That at said time, the said shock absorbers were little known in South Carolina, and under and by the terms of such agreement, the plaintiff was to advertise the said shock absorbers, put salesmen on the road, and push their sale in every way, in order to do which the plaintiff would have to incur considerable expense; in view of this fact, plaintiff advised the said defendant that he would not enter into such contract unless he could retain it for a sufficient period of time to make it worth his while, for the reason that, after working up a large sale for said shock absorbers, plaintiff did not purpose to have the distribution of same taken away from him; that thereupon the defendant presented to plaintiff a blank form of general distributor's contract for execution, and it was then and there agreed that the blanks in said form should be forthwith filled in by the defendant so that the plaintiff should be State distributor, and should have the exclusive distribution and sale of Hassler Shock Absorbers in the State of South Carolina for a period of five years from the date thereof, and for so long thereafter as plaintiff should actively push the sale of said shock absorbers; and that the cancellation provision in said blank form of contract should be stricken therefrom, and upon, and in consideration of said agreement, the plaintiff subscribed his name to said blank form, which was not at that time signed by defendant, nor was a copy thereof given to plaintiff, but the defendant agreed to have said blank form filled out as aforesaid, subscribed by itself, and mailed to plaintiff the

following day. Plaintiff alleges that it was not the intention of said defendant to so fill out said blanks, and that said promise was false and fraudulent and made for the purpose of inducing plaintiff to sign said blank form.

5. That the plaintiff thereupon left Indianapolis, and immediately commenced the performance of said contract on his part, ordering out from the defendant Hassler one car load of shock absorbers, which were delivered to, and accepted by, him under said contract, putting salesmen on the road, advertising and establishing a complete organization to sell the said shock absorbers in South Carolina, and placing local agencies with desirable firms in different localities within the State; that the defendant Hassler, with knowledge of [fol. 26] these activities on the part of the plaintiff withheld from him his contract as aforesaid, and permitted, acquiesced in and induced the plaintiff to proceed with the performance of said contract on his part; that finally, after repeated requests therefor, on or about the 8th day of November, 1918, the said defendant forwarded to plaintiff a paper purporting to be his contract, to-wit, the blank form above referred to, which had been filled in and signed by the said defendant.

6. That upon receipt of this document, plaintiff ascertained that the said defendant had violated its contract and agreement, in that it did not incorporate in the said blank form, signed by plaintiff as aforesaid, the provisions which it was agreed should be incorporated therein, and, on the contrary, so filled out the same that said instrument purported to give the said defendant rights and privileges contrary to said agreement, and purported to terminate at a different and shorter period than that agreed upon, and purported to give the defendant the right to cancel the same on thirty days' notice.

7. That shortly after receiving said document, the plaintiff went again to Indianapolis, and stated to the defendant Hassler that he had come to have his contract corrected, because it did not conform to the provisions of his agreement in the particulars above set forth; that the defendant, well knowing that the plaintiff had commenced actively and successfully to sell the said shock absorbers, and to establish a trade therefor in South Carolina, and knowing that the plaintiff was especially well qualified to continue therewith, and knowing that the plaintiff would not do so under any other agreement than that first made between them, advised plaintiff that the form of his contract should give him no worry, admitted that the said form was not filled out in accordance with the agreement between itself and plaintiff, and agreed that the contract, as sent to plaintiff, should stand, with the modification, in accordance with the agreement between the parties, that plaintiff should continue to be distributor for the State of South Carolina, for the term of five years, and for so long thereafter as plaintiff should push the sale of said shock absorbers, and should have a sufficient supply of shock ab-

[fol. 27] sorbers to meet the demand created by him and said local agents therefor, and that the cancellation clause should be stricken therefrom, which agreement plaintiff then and there accepted.

8. That the plaintiff is informed and believes, and so alleges, that the said agreement was made with the intent and for the purpose of inducing the plaintiff to go on with the shock absorber business, and firmly establish the same in South Carolina at his own expense; that plaintiff thereafter, did return to South Carolina, and did go on with said business, and did firmly establish it in that State at his own expense.

9. That in pursuance with said contract, the said defendant shipped to Columbia, S. C., a car load of said shock absorbers, the same having been, at the time of the commencement of this action, in the hands of the defendant, Columbia Compress Company, and on or about the 23rd day of April, 1919, the defendant Hassler, without previous notice to plaintiff, and in utter disregard of plaintiff's rights under his contract, unlawfully and fraudulently attempted to cancel and terminate plaintiff's contract, and, so plaintiff is informed and believes, instructed and warned the said Columbia Compress Company, which is engaged in a storage business, not to turn said shock absorbers over to plaintiff, and the said Columbia Compress Company, at the time of the commencement of this action, retained possession of said shock absorbers, which were still the property of the defendant, Robert H. Hassler, Inc., and refused to turn the same over to plaintiff, although plaintiff was ready, willing and anxious to pay therefor.

10. That the said Columbia Compress Company has been advised by plaintiff that the said Robert H. Hassler, Inc., was without right or warrant in its attempted cancellation of plaintiff's contract, and that the plaintiff still had the exclusive right and privilege to purchase said shock absorbers from the defendant Hassler, but the said Columbia Compress Company refuses to recognize plaintiff's rights, and refuses to permit him to purchase said shock absorbers, by, with and under instructions from the defendant, Robert H. Hassler, Inc., so plaintiff is informed and believes.

[fol. 28] 11. That the defendant, Robert H. Hassler, Inc., has refused to sell said shock absorbers to plaintiff and refused to recognize said contract, and, on the contrary, has continued to do business within the State of South Carolina through the same local agents established by plaintiff, so plaintiff is informed and believes.

12. That the said carload of shock absorbers was placed in the hands of Columbia Compress Company under an understanding between plaintiff and the defendants that the said defendants should turn same over to plaintiff upon payment of the purchase price therefor; that plaintiff was ready, willing and anxious to pay for said shock absorbers, and offered to do so, but the defendants have failed and refused to turn over said shock absorbers, and have failed and refused to accept payment thereof.

13. Plaintiff alleges that throughout its negotiations with him, and throughout the dealings and transactions herein set forth, it was the intent, plan and purpose of the defendant Hassler to entice the plaintiff into the shock absorber business, and induce him to establish a trade for shock absorbers in South Carolina, at his own expense, and then, when said trade had been established to dismiss the plaintiff from its employ, in disregard of its contract and agreements and in fraud of plaintiff's rights; and plaintiff alleges that the acts and doings of the said defendant, as herein set forth, were done and performed in pursuance with said plan or scheme, that the plaintiff relied upon the promises and inducements held out by the said defendant, and in good faith performed his part of his agreements, but that the said defendant, in pursuance with said scheme, wilfully and fraudulently failed and refused to carry out its agreement; that in good conscience, the said defendant should not be permitted to reap the fruits of said scheme, but should be made to perform its contract aforesaid, or respond in damages to plaintiff for its failure to do so.

14. Plaintiff alleges that the business of distributing shock absorbers is a profitable one, and that, in South Carolina, it would have been especially profitable for plaintiff, by reason of the extensive [fol. 29] advertisement given by him to the said shock absorbers, and his familiarity with the said business, all of which was well known to defendants, and that the acts of said defendants, in breaching said contracts, have resulted to plaintiff's damage in the sum of One Hundred seventy-five thousand dollars.

Wherefore plaintiff prays judgment against the defendants for the sum of one hundred seventy-five thousand dollars, and costs.

Jennings & Harby, Clifton & Wood, Attorneys for the Plaintiff.

Sworn to by D. C. Shaw. Jurat omitted in printing.

IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDED ANSWER—Filed March 31, 1921

[fol. 30] The Answer of Robert H. Hassler, Inc., to the Amended Complaint Herein

The Defendant, Robert H. Hassler, Inc., answering the Amended Complaint of the Plaintiff, alleges:

For a First Defense

I. That this Court has no jurisdiction of this defendant because at the time of the beginning of this action it was and is

now a foreign corporation, to-wit, a corporation organized under the laws of the State of Indiana; that it has never been domesticated within the State of South Carolina; and at said time it did not have, and has not now, either officers or offices or agents within said state, and prior to and at the time of the commencement of this action was not doing business therein. And this defendant further says that on the 3rd day of May, 1919, it had no property within the State of South Carolina, upon which attachment could be legally levied, so as to give this Court jurisdiction of this defendant, or its property, as is required by the Statute Law of the State of South Carolina in such case made and provided.

II. And this defendant further alleges that upon the service of the Summons and Complaint herein upon it, it entered no general appearance in this action, but it did enter a special appearance for the purpose of moving to set aside the service of the said Summons and Complaint upon it upon the grounds that will more fully appear by reference to the copy of Notice hereto attached and made a part of this Answer and marked Exhibit "A," and that after such Notice had been duly served upon plaintiff's attorneys, a Motion was made on the 30th day of May, 1919, to set aside the service of said Summons upon this defendant, on the grounds stated in the Notice, and that such Motion was heard by the Honorable John S. Wilson, Judge of the Third Judicial Circuit of South Carolina, who thereafter refused the said Motion by an Order filed on the 31st day of May, 1919, a copy of which is hereto attached and marked Exhibit "B," and hereby made a part of this Answer, and wherein and whereby he expressly re- [fol. 31] served to this defendant the right to set up in its Answer the special defense that this court had no jurisdiction of this defendant, if the defendant deemed it advisable to do so; so that, pursuant to the right so reserved to it in said Order, now a part of the record in this case in this Court, this defendant objects to the jurisdiction of the Court as hereinbefore set forth.

For a Second Defense

Further answering the Complaint and reserving its right to object to, and not waiving its rights under its plea to the jurisdiction as fully set forth in the First Defense above set forth, this defendant alleges:

I. It admits the allegations contained in the first paragraph of the Complaint, except the allegations that at the time of the commencement of this action it had property within the State of South Carolina, and was doing business therein, which allegations it expressly denies.

II. It admits to much of the allegations of the second paragraph thereof as charges that it is a corporation engaged in the manufacture and sale of Hassler Shock Absorbers for use on Ford automobiles, and denies the remaining allegations of said paragraph; and further answering said paragraph the defendant says

that the fact is that its business practice is to enter into a written contract agreeing to sell exclusively to a dealer denominated "General Distributor," who is granted the exclusive right to buy f. o b. Indianapolis, Indiana, and sell Hassler Shock Absorbers in a particular territory to a specified quantity at a specified price, which "General Distributor" in turn sells to retail dealers. That while said dealers are called "General Distrubtors" they are in no sense agents of this defendant, and occupy no other relation to this defendant than that of its vendee; and this defendant denies that at any time it ever employed any agent known as "State Distributor" or otherwise in the State of South Carolina.

III. It admits so much of the allegation of the third paragraph as avers that in the latter part of August, 1918, the plaintiff went [fol. 32] to Indianapolis, Indiana, to the offices of this defendant, for the purpose of arranging to become General Distributor of said shock absorbers in South Carolina, and it denies all of the other allegations of said third paragraph; and avers the fact to be that after negotiations upon the occasion of the said visit of the plaintiff to the office of the defendant in August 1919, and after subsequent negotiations the plaintiff and the defendant entered into a written contract, a copy of which is hereto attached and marked Exhibit "A". And this defendant alleges that the said written contract hereto attached and marked Exhibit "A" constitutes the only contract ever at any time made between the said David C. Shaw, plaintiff herein, and the defendant, the said Robert H. Hassler, Inc.

IV. This defendant denies the remaining allegations contained in the paragraphs of the Amended Complaint numbered four to fourteen, both inclusive, save and except as hereinafter addmitted.

V. Further answering said Complaint and for a further defense to said action, this defendant says that although the agreement mentioned in the Complaint, whereby as the plaintiff alleges, the plaintiff was to have the exclusive distribution and sale of the defendant's shock absorbers in the State of South Carolina for the period of five years from the date thereof, was not to be performed within one year from the making thereof, neither such agreement nor any note or memorandum thereof was ever in writing and subscribed by this defendant, which is sought to be charged therewith, or by some person by it thereunto lawfully authorized, as required by the provisions of the Statute in such case made and provided, and this defendant alleges that the plaintiff can recover nothing under the said alleged contract.

VI. Further answering said Complaint this defendant alleges that on or about the 23rd day of August, 1918, it did after negotiations duly had for some time prior thereto, enter into a contract for the sale of shock absorbers to the plaintiff, which contract was reduced to writing, and signed by the parties thereto; a copy of [fol. 33] which contract is hereto attached and made a part of this Answer and marked Exhibit "C," and that the said contract embodied and crystallized all of the terms of the contract as agreed upon by and between the parties hereto.

VII. That on or about the 11th day of January, 1919, in accordance with said contract, and the instructions of the plaintiff herein, this defendant shipped to the order of Robert H. Hassler, Inc., Order Notify the said D. C. Shaw, or Columbia Sales Agency, one (1) carload of shock absorbers, and drew upon the said Columbia Sales Agency, or D. C. Shaw, through a bank in Columbia with the said order notify bill-of-lading attached, for the purchase money thereof.

VIII. Upon information and belief this defendant alleges that the said carload of shock absorbers arrived at destination some time prior to the 7th day of February, 1919; and that the plaintiff was notified in accordance with the terms of the said bill-of-lading, and refused to pay the said draft drawn against the said shipment and to accept the said carload of shock absorbers and pay for the same. That the said carload of shock absorbers remained on the track at Columbia, S. C., until some time after March 14th, 1919. That the said draft and bill-of-lading by it, on the 14th day of March, 1919, was sent to the J. N. Finley Transfer Company of Columbia, S. C., with orders and directions to the said J. N. Finley Transfer Company to secure the goods and put them in storage for the account of the said Robert H. Hassler, Inc.

IX. That thereafter J. N. Finley notified this defendant that in accordance with its instructions, the car of shock absorbers had been received and placed in a warehouse for its account, and thereupon this defendant paid the freight, storage and demurrage charges thereon to said J. N. Finley.

X. That the plaintiff having failed to pay for the said carload of shock absorbers, this defendant, under and by virtue of the terms of its contract with the plaintiff, cancelled the said contract on the 23rd of April, 1919, as will appear by the copy of letter written to said plaintiff upon that day, hereto attached, made a part of this Answer, and marked Exhibit "D".

[fol. 34] XI. That thereafter, to-wit, on the 24th day of April, 1919, this defendant sold and delivered the said carload of shock absorbers in custody of said Finley at Columbia, S. C., to the Hassler Sales Agency, a corporation organized and existing under the laws of the State of Virginia, for the sum of Nine Thousand Six Hundred and Twenty-Two and 55/100 Dollars ($9,622.55), and on said day delivered to Indiana National Bank of Indianapolis, Indiana, a draft drawn on said Hassler Sales Agency for said sum and attached thereto an order upon said J. N. Finley to deliver said goods to the said Hassler Sales Agency, and an invoice of said goods to be delivered to said Hassler Sales Agency upon payment of said draft. That on May 2nd, 1919, the said Hassler Sales Agency at Richmond, Virginia, paid said draft and received said written order and invoice.

XII. That neither the defendant, Robert H. Hassler, Inc., nor any stockholder, director, officer, or any third person for the benefit of them or either of them, on said 24th day of April, 1919, or since, was or is, the holder or owner of any of the shares of the capital

stock of said Hassler Sales Agency or had or has any interest of any kind therein.

XIII. This defendant denies that there was any agreement whatsoever made by and between the plaintiff, the Columbia Compress Company, and this defendant, that the said carload so placed in storage at the Columbia Compress Company's warehouse was subject to be delivered to the said plaintiff upon his payment for same, and denies further that it had any knowledge that the said shock absorbers were in the possession of the said Columbia Compress Company prior to the commencement of this action.

XIV. This defendant specifically denies the allegation contained in paragraph four of the Complaint that "It was not the intention of said defendant to so fill out said blanks and that said promise was false and fraudulent and made for the purpose of inducing plaintiff to sign said blank form"; and this defendant further denies each and every charge or allegation or suggestion made in said Complaint that at any time in any manner by any fraudulent promise, representa-[fol. 35] tion, device or plan it sought to or intended to deceive or mislead the plaintiff, but, on the contrary, alleges that the foregoing statement of its transactions with the plaintiff is a complete statement of all the material matters connected with such transaction.

XV. And this defendant further alleges that the shipments of shock absorbers made by it to the plaintiff were made solely pursuant to the provisions of the written contract hereinbefore referred to and hereto attached and marked Exhibit "C", and were not made pursuant to or in part performance of any other engagements, agreement or contract whatever.

And having fully answer- said Complaint defendant prays that same may be dismissed with costs.

Rutledge, Hyde & Mann, Attorneys for Defendant, Robert H. Hassler, Inc.

Sworn to by Edward W. Springer. Jurat omitted in printing.

[fol. 36] IN UNITED STATES DISTRICT COURT

ISSUES FOR JURY ON TRIAL NOVEMBER 8 & 9, 1921

I. Did the defendant, Robert H. Hassler, Inc., commit a breach of its contract with the plaintiff, D. C. Shaw, as mentioned and alleged in the complaint.

Yes.

II. If the defendant, Robert H. Hassler, Inc., did commit a breach of its said contract, what amount of money, from a compensatory point of view, represents the damages actually caused to plaintiff by such breach.

Fifteen thousand dollars.

N. M. Lowrance, Foreman.

Nov. 10, 1921.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER AS TO SETTLING BILL OF EXCEPTIONS AND EXTENDING TERM —Filed May 29, 1924

All of the proceedings in the above entitled cause prior to the Special Term of this Court beginning April 21, 1924, were had before my predecessor, Hon. Henry A. M. Smith, lately retired from active service under the recent Act of Congress. Certain motions and proceedings were had before me during the said Special Term beginning April 21, 1924. The parties may desire to have bills of exceptions settled as to certain matters and proceedings had before Hon. Henry A. M. Smith, and may desire to have bills of exceptions settled also in regard to proceedings had before me at said Special Term beginning April 21, 1924. The said Special April Term is now about to expire by the commencement of the regular June term, and it is desirable that the parties have further time to prepare their said bills of exceptions. I have, pursuant to the Act of Congress, requested Hon. Henry A. M. Smith, U. S. Judge, to hear and de- [fol. 37] termine and settle all matters connected with any proposed bill of exceptions as to the proceedings had before him, and he has expressed his willingness to hear and determine all of said matters connected with the proceedings before him.

It is Therefore

Ordered, that any party desiring to have a bill of exceptions settled as to the proceedings before Hon. Henry A. M. Smith do prepare the same by a separate bill of exceptions and serve the same as hereinafter provided and that such separate bill of exceptions be heard and determined and settled by and before Hon. Henry A. M. Smith, U. S. Judge,

It is

Further Ordered, That any party desiring to have a bill of exceptions settled as to the proceedings before me shall prepare a separate bill of exceptions of the same and serve the same as hereinafter provided, and such bill shall be heard, determined and settled by and before me. It is

Further Ordered, That the present Special Term of this Court which commenced April 21, 1924, and jurisdiction of the Court over the said cause, be and the same is hereby extended for a period of sixty (60) days from the date of this order for the purpose of settling the bills of exceptions hereinbefore mentioned. It is

Further Ordered, That the time within which any party shall prepare and serve upon the opposite party or his or its counsel any of the said proposed bills of exceptions is hereby extended for a period of thirty (30) days from the date of this order and the opposing party shall have ten (10) days after such service within which to serve any purposed amendments thereof, and thereupon such bill of

exceptions may be submitted to the Judge who is, in accordance with this order, to determine and settle the same, for settlement in the time and manner as provided in Rule 44 of this Court; provided that all bills of exceptions shall be settled not later than sixty (60) days from the date of this order.

Ernest F. Cochran, U. S. District Judge.

[fol. 38] IN UNITED STATES DISTRICT COURT

OBJECTIONS TO ALLOWANCE OF BILL OF EXCEPTIONS

Now comes the plaintiff, D. C. Shaw, and objects to the allowance of Bill of Exceptions herein, as to the proceedings before Honorable Henry A. M. Smith, District Judge, on the following grounds:

1. That the time provided by the rules of Court for the filing of a Bill of Exceptions has expired.

2. That the term at which this action was tried has ended, and that this honorable Court has not now jurisdiction to file and allow a Bill of Exceptions in this cause.

L. D. Jennings, A. S. Harby, Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT

ORDER OVERRULING OBJECTION AND ENLARGING TIME FOR SETTLING BILL OF EXCEPTIONS—June 27, 1924

On this 27th day of June, 1924, counsel in the cause appeared before me under the terms of the order of the Hon. Ernest F. Cochran filed herein on May 29, 1924, for the purpose of settling the bill of exceptions as to the proceedings before me.

On the appearance of counsel for that purpose, it was objected on the part of the plaintiff that the time provided by the rules of Court for the filing and settlement of a bill of exceptions as to the proceedings in the trials before me had expired and that this Court has not now jurisdiction to settle and allow any such bill of exceptions. The order of Hon. Ernest F. Cochran made May 29, 1924, extends the time of the Special Term of this Court, which commenced April 21, 1924, for a period of sixty (60) days from the date of the order for the purpose of settling the bills of exception mentioned in the order. By that order it was intended not to confer any greater rights upon the parties, but that simply as to such rights as they possessed with regard to writs of error and bills of exceptions as existed at the April term, 1924, said term should be extended for a period of sixty (60) days. The trial before me for the settlement of the bills of exceptions, [fol. 39] of which the motions are now being pressed, took place at

the November term, 1921; and counsel for plaintiff now raises the question that the power of the Court to settle and allow a bill of exceptions for matters happening and trials had at the November term, 1921, had long expired, at the date of the making of this order of Judge Cochran and at the April term, 1924.

Under Rule 44 of the Rules of Practice of this Court, it is provided that no bill of exceptions will be settled or allowed if not presented for settlement within sixty days after the rendition of the verdict in the cause, if tried before a jury, unless the time be enlarged by a Court or Judge thereof.

No bill of exceptions was presented for settlement within sixty days as mentioned in the rule, and the April, 1924, term was long after the lapse of such sixty days. Notwithstanding that, the rule provides that the time may be enlarged by the Court or a Judge thereof. The circumstances of this case being such as in the opinion of the Court call for the allowance of such enlargement, and no legal prejudice on the merits whatsoever resulting therefrom to the plaintiff,

It is

Ordered by the Court that the objection be overruled and that the time for settling such bill of exceptions be enlarged and continued until this date.

Henry A. M. Smith, U. S. Judge.

Plaintiff's counsel except to the above ruling—and exception allowed.

In United States District Court

Bill of Exceptions—Filed June 27, 1924

Caption

Be it remembered, that on the 8th, 9th and 10th days of November, in the year of our Lord, One thousand, nine hundred and twenty-one, at the November term of the said Court, begun and holden at Columbia, S. C., before the Hon. Henry A. M. Smith, District Judge, the issue joined in the above stated case between [fol. 40] the parties herein came on to be tried before the said Judge and a jury, the plaintiff being represented by Messrs. L. D. Jennings and A. S. Harby and John A. Clifton, and the defendants by Messrs. Benjamin H. Rutledge and Simeon Hyde and Douglas McKay, their attorneys, the jury was empaneled and sworn and thereupon certain proceedings had which are hereinafter set forth:

Be it Further Remembered, that on the 9th day of November, in the year of our Lord One thousand, nine hundred and twenty-one, at the November term of the said court and holden at Columbia, S. C., at and for the Eastern District of South Carolina before

the Hon. Henry A. M. Smith, District Judge, the issues joined in the above stated case between the parties herein came on to be tried, the following proceedings were had, hereinafter set forth.

Bill of Exceptions in the Application for Writ of Error to the United States Circuit Court of Appeals for the Fourth Circuit as to Proceedings Before the Honorable Henry A. M. Smith, District Judge.

This is an action at law commenced on the 3d day of May, 1919, in the Court of Common pleas, for Sumter County in the State of South Carolina, and which was subsequently removed to the District Court of the United States for the Eastern District of South Carolina, upon the ground of diversity of citizenship.

A motion to remand was subsequently made as shall hereafter appear, which after argument before the Hon. Henry A. M. Smith, District Judge, was refused by him.

The action was for the recovery of damages to the amount of One hundred and seventy-five thousand dollars ($175,000.00) for alleged breach of a contract between the plaintiff and the defendant, R. H. Hassler, Inc., providing for the exclusive right to sell Hassler Shock Absorbers in certain territory mentioned in said contract.

Te action was commenced by an attachment upon certain property claimed to belong to the defendant, then stored with the co-[fol. 41] defendant, Columbia Compress Company.

Within the time for answering, the defendant moved in the State Court, after due notice, before the Hon. John S. Wilson, Circuit Judge, to vacate the attachment upon the ground that said property did not belong to the defendant, R. H. Hassler, Inc., at the time of the levying of the said attachment, and that the Court therefore was without jurisdiction to proceed with said action, and that the service of said Summons should therefore be set aside.

The Notice and Affidavits upon which said Motion was based, are as follows:

Notice to Set Aside Service of Summons—Omitted; printed side page 8, ante

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[fol. 42] Affidavit of Edward W. Springer

Edward W. Springer, being duly sworn upon his oath, deposes and says that he is the treasurer of Robert H. Hassler, Inc. That said Robert H. Hassler, Inc., at the time of the commencement of this suit was and still is a corporation organized and existing under and by virtue of the laws of the State of Indiana having its principal office and place of business at the City of Indianapolis, county of Marion, and State of Indiana.

That said corporation is the same corporation named as defendant in the above entitled action. That said defendant, Robert H.

Hassler, Inc., at and before the time of the commencement of this action was not, and at no time thereafter has been engaged in doing business in the State of South Carolina, and was not a citizen and resident or inhabitant of said State, and that it had no agent, officer or other person residing in said State or within the jurisdiction of said State, upon whom service or process could be made.

That heretofore, to-wit: on or about January 11, 1919, said Robert H. Hassler, Inc., delivered to a common carrier one carload of shock absorbers for Ford cars loaded in Car PRR #54597 and received from said common carrier a bill of lading therefore known as an order bill of lading (the said Robert H. Hassler, Inc., being both consignor and consignee in said bill of lading) with an order and direction on said bill of lading to notify Columbia Sales Agency, to which it attached a sight draft for the sum of $8,662.50, drawn upon Columbia Sales Agency, and sent said draft and bill of lading [fol. 43] through the Indiana National Bank of Indianapolis, Indiana, for collection at Columbia, South Carolina.

That said carload of shock absorbers in Car PRR #54597 arrived at Columbia, S. C., on or about February 7, 1919; that said Columbia Sales Agency refused to accept said draft and bill of lading and refused to accept said car load of shock absorbers and pay for the same; that said carload of shock absorbers remained on track at Columbia, S. C., until some time after March 14, 1919, at which time said Robert H. Hassler, Inc., having received through the bank return of said draft and bill of lading, sent said bill of lading covering said car PRR #54597 to the J. N. Finley Transfer Company of Columbia, South Carolina, with orders and directions to said last named company upon receipt of said bills of lading to secure the goods represented by the same and put the goods in storage for the account of the said Robert H. Hassler, Inc. A copy of the letter enclosing said bills of lading covering the said car of goods aforesaid, is hereto attached, marked "Exhibit A."

That afterwards on March 25, 1919, said Robert H. Hassler, Inc., received from J. N. Finley, Columbia, S. C., a letter dated March 20, 1919, stating that said car of goods had been received and placed in warehouse and that the freight, demurrage and storage accrued thereon, was as follows: Freight $526.92; demurrage $61.80; storage $22.00 per month.

That said original letter from said Finley is hereto attached marked Exhibit "B."

That on March 25, 1919, said Robert H. Hassler, Inc., remitted to J. N. Finley of Columbia, South Carolina, $610.72 covering said freight charges, demurrage and one month's storage, and in its letter covering said remittance, requested said J. N. Finley to acknowledge receipt of the remittance and send at the same time paid freight bill showing both freight and demurrage charges and also receipt for storage, and requested that the goods be insured for $7,500.00 in favor of said Robert H. Hassler, Inc., and that the policy for the insurance be forwarded to its as quickly as possible.

A copy of said letter so sent to said Finley on March 25, 1919, is hereto attached marked "Exhibit C."

That said J. N. Finley has informed said Robert H. Hassler, Inc., that sometime in March, he sent by registered letter ware- [fol. 44] house receipts covering said goods aforesaid in storage, but if said warehouse receipts were ever so mailed they were never received by said Robert H. Hassler, Inc., and said last named company has never received from said J. N. Finley or the Columbia Cotton Compress Company or any other person any warehouse receipts representing said goods aforesaid *on* storage at Columbia;

That prior to April 24, 1919, said Robert H. Hassler, Inc., sold to the Hassler Sales Agency, Inc., of Richmond, Virginia, which, as affiant is informed and believes, is a corporation organized and existing under and by virtue of the laws of the state of Virginia, said shock absorbers aforesaid, which had been shipped to Columbia, South Carolina, in car PRR #54597, and that they were then and there in storage at Columbia, South Carolina, with J. N. Finley, Bailee.

That on said 24th day of April, 1919, said Robert H. Hassler, Inc., made a draft upon said Hassler Sales Agency, Inc., of Richmond, Virginia, for the contract price of said goods aforesaid, to-wit, the sum of $9,622.55, to which it attached an invoice of said goods and a written order upon said J. N. Finley, Columbia, S. C., its bailee, in Columbia, South Carolina, to deliver said goods aforesaid to said Hassler Sales Agency, Inc., of Richmond, Virginia.

That said draft, invoice and written order for the delivery of said goods, were sent through the Indiana National Bank of Indianapolis, Indiana, to Richmond, Virginia, and as affiant is informed and believes, were presented to said Hassler Sales Agency, Inc., on May 2, 1919, and said draft on said day, at Richmond, Va., was paid and said invoice and written order for the delivery of said goods accepted. That the proceeds of said draft were received by Robert H. Hassler, Inc., through the Indiana National Bank, Indianapolis, Indiana, on May 6th, 1919.

That neither Robert H. Hassler, Inc., defendant in the above entitled cause, nor any of its stockholders, now own or at any time owned any of the shares of capital stock of said Hassler Sales Agency, Inc., of Richmond, Virginia, or has any interest of any kind or any connection therewith except the relation of vendor and vendee, [fol. 45] of shock absorbers, between Robert H. Hassler, Inc., and the said Hassler Sales Agency, Inc.

That from the second day of May, 1919, to the present time said defendant, Robert H. Hassler, Inc., has had no right, title or interest in said goods aforesaid in the possession of its bailee, J. N. Finley, or in the possession of the Columbia Cotton Compress Company (if the same were in the possession of the last named company), of which defendant has no knowledge.

That until the commencement of this suit, Robert H. Hassler, Inc., had no knowledge that any of said goods aforesaid were in the possession of the Columbia Cotton Compress Company and if they were ever delivered to the possession of that Company, they were not delivered to it the knowledge or consent of said defendant,

Robert H. Hassler, Inc., except as said J. N. Finley was authorized to store said goods.

That said defendant, Robert H. Hassler, Inc., at the time that it placed said goods in the possession and custody of said J. N. Finley, as bailee, was informed and believed, that he was a warehouseman and believed that said goods were in his possession as a public warehouseman, and had no knowledge otherwise except as informed by the complaint in the above entitled action.

That all of the statements herein made by this affiant upon information and belief, are made upon information derived from the correspondence in the possession of Robert H. Hassler, Inc., coming to him as an officer of said corporation in its regular course of business.

Further affiant said not.

Edward W. Springer

Filed June 2, 1919. H. L. Scarborough, C. C. C. P.

EXHIBIT "A" TO AFFIDAVIT OF E. W. SPRINGER

March 14, 1919.

The J. N. Finley Transfer Company, Columbia, S. C.

GENTLEMEN: Enclosed please find our order notify B. L. 7608 [fol. 46] and 7609 covering Pennsylvania 54597 consigned to our order Notify Columbia Sales Agency, Columbia, S. C. Upon receipt of this lading will you kindly secure these goods and put same in storage to our account, advising us charges and we will mail you check for same.

Yours very truly, Robert H. Hassler, Inc., Traffic Manager

ENN. KMc.

EXHIBIT "B" TO AFFIDAVIT OF E. W. SPRINGER

Columbia, S. C., March 20, 1919.

Robert H. Hassler, Indianapolis, Ind.

DEAR SIR: In reply to yours of March 14th, I beg to advise that car of goods have been received and placed in warehouse. Will be glad to handle the goods.

I will quote prices to you for freight, demurrage and storage, freight $562.92, demurrage $61.80. You can send check to me covering freight and demurrage. The storage will be $22.00 per month.

Hoping this will be satisfactory, I am

Yours very truly, J. N. Finley

Invoice paid Mar. 25, 1919. Check No. 3082.

EXHIBIT "C" TO AFFIDAVIT OF E. W. SPRINGER

March 25, 1919.

Mr. J. N. Finley, 900 Washington Street, Columbia, S. C.

DEAR SIR: We have your letter of March 20 and are enclosing [fol. 47] check for $610.72 which pays freight charges amounting to $526.92, demurrage $61.80 and one month's storage on the car-load shipment of shock absorbers which you have placed in storage. Kindly acknowledge receipt of this remittance, sending us at the same time paid freight bill, showing both freight and demurrage charges; also receipt for the storage.

In this connection we call attention to the request contained in our letter of March 18th that you have these goods insured for $7,500.00 in our favor. Kindly forward the policy to us as quickly as possible.

Yours very truly, Robert H. Hassler, Inc., —— ——, Treasurer.

EWS/J.

Sworn to by E. W. Springer. Jurat omitted in printing.

[fol. 48] AFFIDAVIT OF THOMAS B. DAVIS

Personally appeared before me Thomas B. Davis, who being duly sworn, says:

That he is the President of the Hassler Sales Agency, Inc., a corporation organized under the laws of the State of Virginia, having its principal office in the City of Richmond in said State, and its business being that of Distributor for Hassler Shock Absorbers for Ford Cars. That it purchases the said shock absorbers from Robert H. Hassler, Inc., the Manufacturers thereof always for cash paid on sight drafts.

That the said Hassler Sales Agency, Inc., is an entirely separate and distinct corporation having no connection whatever with Robert H. Hassler, Inc., either as stockholder or stockholders, or as partners in the business, or as agents, save and except only as distributors of said Shock Absorbers which they buy outright. That no stockholder of either corporation owns stock in the other corporation.

That on or about the 21st of April, 1919, Robert H. Hassler, Inc., offered for sale to the said Hassler Sales Agency, one car load lot of Hassler Shock Absorbers, then in the possession of J. N. Finley, at Columbia, S. C., for the sum of Nine thousand, six hundred and twenty-two dollars and fifty-five cents ($9,622.55). That after due consideration the said Hassler Sales Agency, Inc., agreed to purchase the said Shock Absorbers, for the said sum mentioned above, and authorized and instructed the said Robert H. Hassler, Inc., to draw upon them at sight in Richmond for the said sum of Nine thousand six hundred and twenty-two dollars and fifty-five cents ($9,622.55.) That on the 24th day of April, 1919, the said Robert H. Hassler,

Inc., did draw at sight upon the said Hassler Sales Agency, Inc., for the said sum and in due course the said sight draft was presented to the said Hassler Sales Agency, Inc., in Richmond for payment, and was paid on the 2nd day of May, 1919, hereto attached marked Exhibit A.

That on the 25th day of April, 1919, the said Robert H. Hassler, Inc., by E. W. Springs, Treasurer, delivered to the said Hassler Sales Agency, Inc., an order upon J. N. Finley, 900 Washington Street, Columbia, for the delivery of the said shock absorbers, to the said [fol. 49] Hassler Sales Agency, Inc., upon presentation in accordance with a letter of even date written to said J. N. Finley. Hereto attached marked Exhibit B. That upon payment of the said draft the title to the said shock absorbers of the said Robert H. Hassler, Inc., and all its interests therein terminated and the shock absorbers became the property of the said Hassler Sales Agency, Inc., immediately.

That the first deponent knew of there being any question as to their ownership or title, or right to demand possession of said shock absorbers, by the said Hassler Sales Agency, Inc., was that upon Sunday, the 18th day of May, 1919, he was informed by telephone from the sales manager of the Robert H. Hassler, Inc., from Indianapolis, that the Shock Absorbers had been attached in Columbia in a suit by some one, and that the Hassler Sales Agency, Inc., should send over to Columbia to look after its interest.

The deponent at once went to Columbia and demanded the said shock absorbers from the Columbia Compress Company, with which the same had been stored by the said J. N. Finley, presenting his order therefor, and said demand was refused because of the said Attachment.

Thos. B. Davis.

Sworn to before me this 22nd day of May, 1919. Simeon Hyde, Notary Public, S. C.

Filed June 2, 1919. H. L. Scarborough, C. C. C. P.

Exhibit A to Affidavit of Thomas B. Davis

$9,622.55.

Indianapolis, Ind., April 24, 1919. No. 430-F

At sight pay to the order of the Fletcher American National Bank of Indianapolis Nine thousand six hundred twenty two and 55/100 [fol. 50] dollars, with exchange and collection charges.

Value received and charge the same to account of Robert H. Hassler, Inc. E. W. Springer, Treas., 1012 Broad St., Richmond, Va.

To Hassler Sales agency, 1012 W. Broad St., National State and City Bank.

EXHIBIT B TO AFFIDAVIT OF T. B. DAVIS

Mr. J. N. Finley, 900 Washington St., Columbia, So. Ca.

DEAR SIR: Upon presentation of this letter please deliver to the Hassler Sales Agency of Richmond, Va., or to their authorized representative the stock of shock absorbers referred to in our letter of this same date directed to you.

Yours very truly, Robt. H. Hassler, Inc. E. W. Springer, Treas.

E. W. S./J

AFFIDAVIT DAVID C. SHAW

Personally appeared before me, David C. Shaw, who, being duly sworn, says:

That he is the plaintiff in the above entitled action, and makes this affidavit for use upon the hearing of the motion to set aside service of the summons herein, or dissolve the attachment heretofore had in this case; that for the purpose of this motion, plaintiff calls especial [fol. 51] attention to paragraphs 8, 9, 10 and 11 of his complaint, the said complaint being duly verified.

That shortly before the commencement of this action, and on the 24th day of April, 1919, between six and seven o'clock p. m. Eastern time, plaintiff put in a long distance telephone call for Robert H. Hassler, Inc., and upon being informed by central that his call was ready, asked the party on the other end of the line for his name, and was informed by said party that it was Mr. Fouts, whom deponent knows to be the sales manager of Robert H. Hassler, Inc.; that deponent had had, previous to this time, several personal conversations with Mr. Fouts, and, to the best of deponents knowledge and belief, the voice speaking to him over the telephone was the voice of Mr. Fouts; that in the course of conversation, deponent stated that he had orders coming in for shock absorbers that he wanted to know how to fill, and asked Mr. Fouts who the shock absorbers stored in Columbia, these being the ones subsequently attached, belonged to; that Mr. Fouts replied that they were the property of Robert H. Hassler, Inc., and that he was going to send a man down to look after them.

That this conversation occurred on the 24th day of April, 1919, at the time stated; that deponent is certain that it was not prior to that date, and knows that it was on that date, for the following reason: That on April 23d deponent received a telegram from the defendant, cancelling his contract; and that it was the next day that the conversation in question occurred, and deponent has verified the date of said conversation by the records of the telephone company.

That shortly before the attachment in question was levied, deponent, in answer to his inquiry, was informed by the Columbia Compress Company that the shock absorbers stored with them were the property of Robert H. Hassler, Inc., and that previous to the receipt of a copy of the affidavit of Mr. Davis attached to the moving papers herein, deponent had no knowledge or notice of any transfer of the title to said shock absorbers and no notice of any facts sufficient to put him on inquiry with regard thereto;

That acting upon the information given him by Mr. Fouts and by the said Columbia Compress Company, deponent proceeded to have said shock absorbers attached, thereby incurring a considerable [fol. 52] obligation by way of expenses, court costs, attorney's fees, and the liability on the attachment bond.

That at the time the said shock absorbers were attached, deponent was informed as aforesaid, that the said shock absorbers were the property of the said Robert H. Hassler, Inc., and so believed them to be, and that, while the matter of ownership is a matter of law, deponent still believes that at the time of said attachment, the said shock absorbers were the property of the said Robert H. Hassler, Inc.

D. C. Shaw.

Sworn to before me this 30th day of May, 1919. A. S. Harby, Notary Public for S. C.

Affidavit A. S. Harby

Personally appeared before me, A. S. Harby, who being duly sworn, says:

That he is an attorney at law, employed in the office of L. D Jennings, Attorney for the Plaintiff herein.

That on the 20th day of May, 1919, after deponent had left his office, he received a message from Mr. Mark Reynolds to call up Mr. Simeon Hyde at the Jefferson Hotel in Columbia; that deponent accordingly put in a call for Mr. Hyde, and the call was answered by a gentleman who answered to that name; and deponent verily believes that the party so answering the telephone was Mr. Simeon Hyde;

That Mr. Hyde stated to deponent that he represented the defendant in the Hassler matter; deponent asked him which defendand, and he replied Robert H. Hassler, Inc., that Mr. Hyde inquired of deponent when the said Robert H. Hassler had been served with the summons and complaint in the action, or when the publication of the summons had been commenced; that deponent [fol. 53] stated that he had sent the papers to the Sheriff at Indianapolis to be served personally under the Statute, and had not had a return from the Sheriff, and therefore did not know what day the papers had been served; that Mr. Hyde then stated to deponent that he was going to have bond given to release the attachment, that

he understood the property was worth about $9,000.00, and asked deponent if an $18,000.00 bond would be sufficient, and deponent replied that it would; that Mr. Hyde then stated that the surety would be the American Surety Company, and asked deponent if that would be satisfactory, and deponent then said that it would; that Mr. Hyde then stated that there might be a few days' delay in the matter, as he would have to send the bond to Indianapolis to be executed, but that just as soon as it was returned, he would forward it to the Sheriff, and release the attachment; that deponent then stated that he thought the Clerk of Court at Sumter would be the proper party to file the bond with; that Mr. Hyde assented to this view, and deponent stated that as soon as the Clerk notified him that the bond was filed, he would instruct the Sheriff at Columbia to release the attachment;

That during this conversation, Mr. Hyde did not in any way say or intimate that the shock absorbers had been sold prior to the attachment to some third party, but that two days later, on the 22nd day of May, Mr. Rutledge called deponent over the phone from Charleston, and stated to him the substance of the affidavit made by Mr. Davis, and a part of the moving papers in this cause, and on the same date, sent deponent a copy of said affidavit, etc., which was received the next day;

That deponent does not wish to be understood as in-mating that either Mr. Rutledge or Mr. Hyde in any manner concealed any facts from deponent in connection with the matter, or misled deponent in any way, but makes this affidavit simply for the purpose of showing that, although Mr. Davis states in his affidavit that he knew that the shock absorbers had been attached on the 18th of May, and although attorneys had been employed to represent the defendant, Robert H. Hassler, by the 20th of May, over two weeks after the alleged sale to the Hassler Sales Agency, still the said attorneys were not immediately informed that the alleged sale had been made, but, on the contrary, this information could not have been given them [fol. 54] until after they had arranged to release the attachment by bond.

A. S. Harby.

Sworn to before me this 28th day of May, 1919. E. W. Wilson, Notary Public for S. C. (L. S.)

AFFIDAVIT W. H. JEFFORDS

Personally appeared before me, W. H. Jeffords, who being duly sworn, says:

That he is the Vice-President and manager of the Columbia Cotton Compress Company, a corporation organized and existing under the laws of the State of South Carolina, with its place of business in the City of Columbia, County of Richland, said State.

That as manager of said corporation deponent is in entire charge of its business and keeps the records of said corporation in his office;

That some time prior to the 4th day of March, 1919, the Southern Railway Company stored with said corporation a carload of shock absorbers, and at said time a warehouse receipt was issued therefor to said Southern Railway Company;

That on the 4th day of March, 1919, Mr. J. N. Finley surrendered said warehouse receipt to said corporation and had a new warehouse receipt issued for said shock absorbers to Robert H. Hassler, Inc.; that said receipt bore the number 801, was dated March 4th, 1919, and called for 220 boxes auto parts.

That the said receipt is still outstanding and had not been surrendered, nor has any notice of any transfer thereof been given to deponent or to the Columbia Cotton Compress Company, and that said shock absorbers were still in the name of the said Robert H. Hassler, Inc., on May 5th, 1919, when they were attached by the Sheriff of Richland County, and that said shock absorbers are at this time stored with said Cotton Compress Company in the name of Robert H. Hassler, Inc., subject, however, to said attachment.

[fol. 55] That neither deponent nor the Columbia Cotton Compress Company have ever received any notice that the said shock absorbers were the property of the Hassler Sales Agency, Inc., nor any notice whatever of any change in ownership of said shock absorbers.

That on the 20th day of May, 1919, Mr. Simeon Hyde, who is one of the attorneys for Robert H. Hassler, Inc., came to deponent's office with two other gentlemen; that Mr. Hyde introduced one of these gentlemen to deponent as Mr. Hassler, "the gentleman who owns the shock absorbers you have here," and the other gentleman was introduced as Mr. Fotch, who, deponent understands, is connected with the sales department of Robert H. Hassler, Inc.; that Mr. Hyde, Mr. Hassler and Mr. Fotch desired certain information from deponent with reference to the attachment of said shock absorbers, and throughout the conversation made no claim nor referred in any way to the alleged fact that Robert H. Hassler, Inc., had sold said shock absorbers to the Hassler Sales Agency, but, on the contrary, left deponent with the understanding and impression that the said shock absorbers were the property of Robert H. Hassler, Inc.; that at this time these gentlemen requested no transfer of the ownership of said shock absorbers on the books of said Columbia Cotton Compress Company, although they were familiar with the fact that the same now appeared upon the books of said company as the property of Robert H. Hassler, Inc.

W. H. Jeffords.

Sworn to before me this 24th day of May, 1919. Marion F. Winter, Not. Pub. S. C. (Seal.)

Order Refusing Motion to set Aside Service

This matter comes before me on motion to set aside the service on the defendant, Robert H. Hassler, Inc., upon the grounds stated in the moving papers. Plaintiff opposed the motion, and offered certain counter-affidavits.

After hearing argument and giving the matter due consideration. [fol. 56] It is Ordered, That said Motion be, and the same hereby is, refused, without prejudice, however, to the right of defendant to set up such special defense in its answer as to the jurisdiction of the Court as it may deem advisable.

John S. Wilson, Judge Third Circuit.

Manning, S. C., May 31, 1919.

Notice of Filing Petition and Bond for Removal

The plaintiff in the above and foregoing action is notified that the defendant, Robert H. Hassler, Inc., on the 2nd day of June, 1919, will file in the above entitled cause and present to the Court its petition and bond to remove the said cause into the District Court of the United States, in and for the Eastern District of South Carolina.

Rutledge & Hyde, Attorneys for Defendant, Robert H. Hassler, Inc.

We hereby acknowledge service of the above notice this 2nd day of June, 1919, without waiver of any objections thereto.

L. D. Jennings, A. S. Harby, J. H. Clifton, Attorneys for Plaintiff.

Thereupon, before the time for answering expired, Petition and Bond for removal of the cause, pursuant to the Act of Congress relating thereto, was filed in the Office of the Clerk of Court for Sumter County, and the Transcript of Record duly filed in the Office of the Clerk of this Court within the thirty days allowed by law.

Petition for Removal to the District Court of the United States in and for the Eastern District of South Carolina

Your Petitioner, Robert H. Hassler, Inc., respectfully shows to [fol. 57] this honorable Court that it is one of the defendants in this suit which is a suit of a civil nature at common law and that the matter in controversy in this suit exceeds, exclusive of interest and costs, the sum and value of Three Thousand ($3,000.00) Dollars.

That the controversy in this suit is between citizens of different states. That the plaintiff, David C. Shaw, at the time of the com-

mencement of this suit was and still is, a citizen of the State of South Carolina and a resident and inhabitant of the County of Sumter within the Eastern District of South Carolina.

That your petitioner, Robert H. Hassler, Inc., at the time of the commencement of this suit was and still is a corporation organized and existing under and by virtue of the laws of the State of Indiana, having its principal office and place of business at the City of Indianapolis, in Marion County, in the State and District of Indiana, and at said times was not and is not doing business in said state of South Carolina nor found within said state and District of South Carolina and did not then have and has not now any property within said State and District of South Carolina.

That this suit was filed in the Court of Common Pleas of Sumter County, and State of South Carolina on May 3, 1919, and is still pending therein.

That the time has not expired at which this petitioner, defendant therein, is required by the laws of the State of South Carolina or the rules of this Honorable Court in which said suit is brought, to appear, answer or plead to the complaint of the plaintiff.

That the defendant, Columbia Cotton Compress Company, is a corporation organized and existing under the laws of the State of South Carolina having its principal office and place of business at Columbia, Richland County, and State of South Carolina, and within the Eastern District of South Carolina, and is there engaged in the storage business, that is to say, in the business of a public warehouseman.

That said defendant is joined in this suit only upon the allegations that it has in its custody certain goods which are averred to be the property of your petitioner.

That in said suit there is a controversy which is wholly between citizens of different states. That is to say, between the plaintiff, David C. Shaw, a citizen and inhabitant of the Eastern District of [fol. 58] South Carolina on the one part, and the defendant, Robert H. Hassler, Inc., a citizen and inhabitant of the State and District of Indiana, and which controversy can be fully determined as between them. And your petitioner is actually interested in such controversy and its co-defendant, Columbia Cotton Compress Company, has no interest therein of any nature.

And your Petitioner offers herewith a bond with good and sufficient surety for its entering in such District Court of the United States, within and for the Eastern District of South Carolina, within thirty (30) days from the date of the filing of this petition, a certified copy of the record in such suit and for paying all costs that may be awarded by the said District Court if said District Court shall hold that such suit was wrongfully or improperly removed thereto.

And your Petitioner therefore prays that the said bond and surety may be accepted; that this suit may be removed into the next District Court of the United States in and for the Eastern District of South Carolina, to be held in the Eastern District of South Caro-

lina, pursuant to the statutes of the United States, and that no further proceedings may be had herein in this Court.

And it will ever pray.

Robert H. Hassler, Inc., by Edward W. Springer, Treasurer.
Rutledge & Hyde, Attorneys for Petitioner.

AFFIDAVIT E. W. SPRINGER

Personally appeared before the undersigned, a Notary Public, in and for said County and State, Edward W. Springer, who being duly sworn, says that he is the Treasurer of Robert H. Hassler, Inc., the petitioner above named; that he is authorized to make this affidavit for and on behalf of said petitioner; that the foregoing petition is true of his own knowledge except as to the citizenship and residence of the Plaintiff, David C. Shaw, and the defendant, Co-
[fol. 59] lumbia Cotton Compress Company, and the incorporation of said last named defendant, and as to said allegations he is informed and believes that said allegations are true; that he derives his information as to said allegations from the complaint and oath thereto by the plaintiff, David C. Shaw.

Edward W. Springer.

Subscribed and sworn to before me this 22nd day of May, A. D., 1919. Martha Martindale, Notary Public, in and for said County and State. My commission expires October 23, 1921. (Seal.)

The motion to remand heretofore referred to was made on the 24th day of October, 1919, upon the following moving papers before Judge Smith, and on the 24th day of October, 1919, Judge Smith filed the following Order refusing said motion:

NOTICE AND GROUNDS TO STRIKE OUT FIRST DEFENSE OF ANSWER

To Messrs. Rutledge, Hyde and Mann, Attorneys for the defendant, Robert H. Hassler, Incorporated:

Please Take Notice that the undersigned, Attorneys for the plaintiff, will move the Court on the call of this case, to strike out the first defense as contained in the Answer herein, said motion to be based upon the record of this cause and the following grounds:

1. That the facts alleged in said first defense, if true, would not constitute a defense in this action, for the reason that it appears thereby that the plaintiff is a resident and citizen of the State of South Carolina, and that the jurisdiction of this Court is invoked solely on the ground of diverse citizenship, and such a suit may be maintained in the District where either the plaintiff or defendant resides.

II. That said alleged first defense, going only to the jurisdiction [fol. 60] of this Court over the person of said defendant, is waived and rendered unavailable to said defendant by reason of the fact that it is joined with an alleged defense to the merits of this cause.

III. That this case, being one in which this Court could take jurisdiction, an appearance such as that contained in the Answer herein, waives all defects in the service and all special privileges of the said defendant in respect to the particular Court in which the action is pending. (St. Louis, etc. Ry. Co. v. McBride, 141 U. S., 127, 35 L. Ed. 659; Western Loan and Savings Company v. Butte & Boston Minn. Co., 210 U. S. 368, 52 L. Ed. 1101.)

John H. Clifton, Jennings and Harby, Attorneys for Plaintiff.

ORDER REFUSING MOTION TO REMAND

This matter came on to be heard upon a motion to remand and was heard upon the record and papers in the cause; and counsel on both sides having been heard, it is found by the Court, upon consideration of the entire record, that there appears upon the face of the complaint herein, that there is in this suit a controversy which is wholly between the plaintiff, David C. Shaw, and the defendant, Robert H. Hassler, Inc., who are citizens of different States; and which can be fully determined as between them, irrespective of and without the presence of the other defendant. It is therefore

Ordered, That the motion to remand this cause to the Court of Common Please for Sumter County be and the same is hereby refused.

Henry A. M. Smith, U. S. District Judge.

Charleston, S. C., October 24, 1919.

Thereupon, the defendant, R. H. Hassler, Inc., duly served its Answer and filed the same in this Court, the first paragraph of said Answer objecting to the jurisdiction of the Court upon the ground that the attached property did not belong to the said defendant, [fol. 61] which had no officer or agent within this State, and no property therein.

Answer heretofore printed in Record, page 12.

Thereafter, the plaintiff's attorneys moved this Court upon affidavits, to strike out the first paragraph of this defendant's Answer, which was a plea to the jurisdiction of the Court, as appears by the papers.

NOTICE OF MOTION TO STRIKE PART OF ANSWER

To Messrs. Rutledge, Hyde and Mann, Attorneys for the defendant, Robert H. Hassler, Incorporated:

Please Take Notice that the undersigned, Attorneys for the plaintiff, will move the Court on the call of this case to strike out the first defense as contained in the Answer herein, said motion to be based upon the record of this cause and the following grounds:

I. That the facts alleged in said first defense, if true, would not constitute a defense in this action, for the reason that it appears thereby that the plaintiff is a resident and citizen of the State of South Carolina, and that the jurisdiction of this Court is invoked solely on the ground of diverse citizenship, and such a suit may be maintained in the District where either the plaintiff or defendant resides.

II. That said alleged first defense, going only to the jurisdiction of this Court over the person of said defendant, is waived and rendered unavoidable to said defendant by reason of the fact that it is joined with an alleged defense to the merits of this cause.

III. That this case, being one in which this Court could take jurisdiction, an appearance such as that contained in the Answer herein, waives all defects in the service and all special privileges of the said defendant in respect to the particular Court in which the action is pending. (St. Louis etc. Ry. Co. v. McBride, 141 U. S. 127; 35 L. Ed. 659; Western Loan and Savings Co. v. Butte & Boston [fol. 62] Minn. Co., 210 U. S. 368, 52 L. Ed. 1101.)

John H. Clifton, Jennings and Harby, Attorneys for Plaintiff.

After hearing, Judge Smith refused the motion, filing the following Order:

ORDER REFUSING MOTION TO STRIKE OUT PARTS OF ANSWER

This matter came on to be heard upon a motion to strike out the first defense contained in the answer of the defendant, Robert H. Hassler, Inc., and counsel on both sides appeared and have been heard.

On consideration of the same and it appearing that the motion at this time depends on whether or not the Court shall hold that the defendant, Robert H. Hassler, Inc., had heretofore by its actions and pleadings herein waived any right to contest the jurisdiction of this Court upon the grounds set up in the first defense and it further appearing to the Court that under the order heretofore made in the State Court by the presiding Judge thereof, that leave was reserved to the defendant to set up the question of jurisdiction heretofore made by him in the State Court in his answer, and it being a question therefore under all the circumstances and the pleadings, whether

or not there has been any such waiver; in the opinion of the Court, it would be better that that question be decided together with all the other questions in the cause at the trial of this cause on the merits. It is therefore

Ordered That the motion to strike out be and the same is hereby refused, but without any prejudice whatsoever to the rights of either party on the hearing of the merits on all questions arising upon the interposition of such defense.

Henry A. M. Smith, U. S. District Judge.

May 10, 1920.

The Hassler Sales Agency of Richmond, Va., thereupon filed in this Court a claim to the possession of the property so attached, upon [fol. 63] the ground that it was the owner thereof, which petition and proceedings thereunder are as follows:

CLAIM OF HASSLER SALES AGENCY, INCORPORATED

And now comes Hassler Sales Agency, Inc., a corporation under the laws of the State of Virginia, and alleges and shows as follows:

First. That it is now and has been, since the second day of May, 1919, the owner of the following property, to-wit, Two hundred and twenty boxes of Hassler Shock Absorbers, which property was on the Fifth day of May, 1919, attached at the instance of the plaintiff in the foregoing suit by the Sheriff of Richland County, in the State of South Carolina, and is now in the possession of the said Sheriff under the attachment proceedings in said suit instituted.

Second. That Hassler Sales Agency is a corporation under the laws of the State of Virginia, with its principal place of business in the City of Richmond, Va., and that neither on the 24th day of April, 1919, or since has Robert H. Hassler, Inc., nor any stockholder, director, officer or any third person for the benefit of them or either of them, been the holder or owner of the shares of the capital stock of said Hassler Sales Agency or had or has any interest of any kind therein.

Third. That the said Hassler Sales Agency is engaged in the selling, handling and distributing of automobile parts and accessories and especially the well known Hassler Shock Absorbers used on Ford cars and that it was permitted at its request to use the name of "Hassler" in its corporate name, the said name having a value in assisting it in disposing of said well known automobile accessory, the Hassler Shock Absorber.

Fourth. That on the 24th day of April, 1919, this Claimant purchased of Robert H. Hassler, Inc., two hundred and twenty boxes of Hassler Shock Absorbers and agreed to honor the draft of said Robert H. Hassler, Inc., for the purchase price thereof, to-wit, Nine [fol. 64] thousand six hundred twenty-two and 55/100 ($9,622.55) Dollars and on the end day of May, 1919, upon the presentation of said draft with an order upon one J. N. Finley, Columbia, S. C., to

deliver said goods to the said Hassler Sales Agency and an invoice of said goods, this Claimant paid the said draft and took up the same, a copy of which is hereto attached and made a part hereof and marked "Exhibit A" and forwarded the said order for the delivery to Hassler Sales Agency of the Two hundred and twenty boxes of said Hassler Shock Absorbers, a copy of which order is hereto annexed, as a part thereof, marked "Exhibit B."

Fifth. That the said Shock Absorbers were not delivered to this Claimant and an officer of Claimant proceeded to Columbia and made demand of said J. N. Finley for the delivery thereof, and he informed him said Shock Absorbers were stored with the Columbia Compress Company and upon demand of said Company for their delivery, the same was refused on the ground that the same were being held subject to attachment levied by the Sheriff of Richland County.

Sixth. That Claimant was informed that they had been attached in some proceedings brought in the State of South Carolina against said Robert H. Hassler, Inc., and Claimant was advised that said attachment would shortly be dissolved and said shock absorbers delivered to him, which has never been done.

Wherefore, the said Hassler Sales Agency, Inc., claims the said property and prays that this Court do order the delivery of said property to this Claimant, and Claimant will ever pray, etc.

Mitchell and Smith, Attorneys for Claimant.

Sworn to by Thomas B. Davis. Jurat omitted in printing.

[fol. 65] EXHIBIT "A" TO CLAIM OF HASSLER SALES AGENCY, INC.—Omitted; printed side page 49 ante

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EXHIBIT "B" TO CLAIM OF HASSLER SALES AGENCY, INC.—Omitted; printed side page 50 ante

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[fol. 66] ORDER TO SHOW CAUSE

Upon reading the verified claim of Hassler Sales Agency, Incorporated, it is ordered that a copy thereof and of this Order be served on the Plaintiff David C. Shaw and the Defendants Robert H. Hassler, Inc., and Columbia Cotton Compress Company, or their Attorneys of Record, and that the Defendants do show cause, if any they can, before this Court at the United States Court House, Charleston, S. C., on the 24th day of May, 1920, at Twelve o'clock

Noon or as soon thereafter as Counsel can be heard why the said property should not be delivered to the said Claimant.

Henry A. M. Smith, United States District Judge.

Charleston, S. C., May 14, 1920.

RETURN OF DAVID C. SHAW

Now comes the plaintiff David C. Shaw, and, by way of return, to the order of this Honorable Court dated May 14th, 1920, and for cause why the property therein referred to should not be delivered to the claimant therein named, showeth:

That the Plaintiff has duly executed a bond with sufficienty surety, in the manner and form prescribed by Section 287 of the Code of Civil Procedure of South Carolina, in the sum provided thereby, and has heretofore, and within ten days after notice of [fol. 67] the claim of the said claimant, filed the same with the clerk of this Court; that under the terms and provisions of said Section, the execution and filing of such a bond is all that is necessary to prevent the delivery of said property to the Claimant.

For further cause, the plaintiff showeth:

That the plaintiff contests the claim of the said claimant; and alleges, upon information and belief, that insofar as this plaintiff is concerned, the property in question is not the property of the Claimant, but is, and at the time of the attachment referred to in said claim, was the property of the defendant Hassler; that under the provisions of law relevant to such a contest, the same is not to be heard and determined upon affidavits, or at Chambers, but an issue should be made up under the direction of this Honorable Court and the question should be tried and determined by a jury, upon the trial of this cause.

For further cause, the plaintiff showeth:

That plaintiff is informed and believes that prior to the 4th day of March, 1919, the Southern Railway Company stored with the Columbia Compress Company, a carload of shock absorbers, and a warehouse receipt was issued to said Company; that on the 4th day of March, 1919, Mr. J. N. Finley, who is engaged in the business of a drayman in the city of Columbia, S. C., surrendered to the said Compress Company the said receipt, and had a new warehouse receipt issued for said shock absorbers to Robert H. Hassler, Inc. That said new receipt bore the number 801, was dated March 4, 1919, and called for 220 boxes auto parts; that the source of plaintiff's information is the affidavit of Mr. Jeffords hereto attached as Exhibit "A." that plaintiff is further informed and believes that Mr. J. N. Finley, in connection with said property, acted as the agent of the defendant Robt. H. Hassler, Inc., the source of plaintiff's information on this point being a certain affidavit, made by Edward W. Springer, treasurer of the said Robt. H. Hassler, Inc., [fol. 68] dated May 22nd, 1919, to which reference is craved as often as may be necessary, the same being part of the record in this cause.

That plaintiff is informed and believes that on the 2nd day of May, 1919, and on the 5th day of May, 1919, and up until the present time, the said property remained in the possession of the Columbia Compress Company as property of the said Robt. H. Hassler, Inc., and under the warehouse receipt issued therefore, as aforesaid, subject, of course, to the attachment levied thereon by the Sheriff of Richland County, and that during said time, the said Columbia Compress Company received no notice from the said Robt. H. Hassler, Inc., or from the Hassler Sales Agency, or from any other person, company, or source, that the said property had been sold or transferred unto the said Hassler Sales Agency, Inc.

The plaintiff, therefore, alleges that the pretended sale of the said property to the Claimant, is, as to this plaintiff, an attaching creditor of the said Robt. H. Hassler, Inc., null and void.

For further cause, the plaintiff showeth:

That heretofore, on or about the 25th day of May, 1920, the defendant Robt. H. Hassler, Inc., noted a motion before his Honor, Judge John S. Wilson, of the Third Judicial Circuit of the State of South Carolina, for an order setting aside the service upon it in this cause on the ground that the said property was the property of the Claimant, and not of said Defendant, and in support of said motion, presented to the Court an affidavit of E. W. Springer, Treasurer of Robt. H. Hassler, Inc., and of T. B. Davis, President of Hassler Sales Agency, that while plaintiff does not admit the truth of the statement contained in said affidavits, and the exhibits thereto attached, plaintiff craves reference thereto as showing more particularly the claim of the Claimant with reference to said property; that plaintiff alleges that the said affidavits in connection with the affidavits hereto attached, show beyond dispute that at the time of the pretended transfer, the property in question was capable of delivery, and was in the hands of Columbia Compress Company, as bailee, under a warehouse receipt; that said receipt was not turned [fol. 69] over to the alleged purchaser, nor was any order upon said bailee given to it, nor was there any delivery, actual or constructive, of the property in question, but the same remained in the hands of said bailee as the property of the defendant Robt. H. Hassler, Inc., without notice of any sort that the same had been sold or transferred to the Claimant; that having been informed by the said bailee that the said property belonged to the defendant Robt. H. Hassler, Inc., and believing said information to be correct, plaintiff proceeded to have said shock absorbers attached, thereby incurring a considerable obligation by way of expenses, court costs, attorney's fees, and liability on his attachment bond; Plaintiff alleges that under these circumstances, title to said property, so far as plaintiff was concerned, did not pass to the Claimant, and that the attachment heretofore levied upon said property is valid and binding, and said property is now rightfully in the possession of this Court, and the application of claimant has been too long delayed to be now considered by the Court.

That the plaintiff attaches hereto certain affidavits as part and parcel of this return.

And now, having made full return to said order, and having

shown good and sufficient cause, the plaintiff prays that said Rule be dismissed.

Jennings and Harby, John H. Clifton, Attorneys for Plaintiff.

Sworn to by David C. Shaw. Jurat omitted in printing.

[fol. 70] AFFIDAVIT OF F. M. JEFFORDS

Personally appeared before me F. M. Jeffords, who, being duly sworn, says:

That he is Manager of the Columbia Compress Company, a corporation under the laws of the State of South Carolina, with its place of business in the city of Columbia, County of Richland, said State;

That as Manager of said corporation, deponent is in entire charge of its business and has in his charge the records of the said corporation;

That some time prior to the 4th day of March, 1919, the records of said company show that J. N. Finley stored with said corporation a carload of shock absorbers, and at said time a warehouse receipt was issued therefor to said J. N. Finley, in the name of Robt. H. Hassler.

That on the 4th day of March, 1919, Mr. J. N. Finley, who at that time was engaged in the business of a drayman in said city, surrendered said warehouse receipt to said corporation and had a new warehouse receipt issued for said shock absorbers, to Robt. H. Hassler, Inc.; that said receipt bore the number 801, was dated March 4th, 1919, and called for 220 boxes auto parts.

That the said receipt is still outstanding and has not been surrendered, nor has any notice of any transfer thereof been given to deponent or to said Columbia Compress Company, and that, on the 5th day of May, 1919, the said shock absorbers were still in the name of the said Robt. H. Hassler, Inc., when they were attached by the Sheriff of Richland County, and that said shock absorbers are at this time stored with said company in the name of Robt. H. Hassler, Inc., subject, however, to said attachment; that there has never been presented to said Compress Company any assignment or transfer of said property, nor has any order directing the delivery of said property to Hassler Sales Agency, or any other person, been presented to said company, nor has said company been notified, so far as deponent knows, of any such assignment, transfer or order.

F. M. Jeffords.

[fol. 71] Sworn to before me this 20th day of May, 1920. W. H. Sowell, (L. S.) Notary Public for S. C.

ORDER AND DELIVERY OF ATTACHED PROPERTY AND JURY ISSUE

This matter came on to be heard upon the return of the defendants made under the order of this Court filed the 14th day of May, 1920,

that cause be shown why the property attached in this action, referred to in the verified claim of Hassler Sales Agency, Inc., should not be delivered to the claimant; and both defendants having filed their returns under the said order, and counsel for all parties having appeared and having been heard, it appears that there is a claim of ownership of the property attached, made by the petitioner, Hassler Sales Agency, Inc., which is traversed by the plaintiff, David C. Shaw; and which claim and traverse presents an issue as to the ownership which should be tried and determined in this Court. It is therefore,

Ordered, That it shall be tried before this Court and a jury at the next term of this Court or as soon thereafter as the action can be conveniently tried, whether or not the Hassler Sales Agency, Inc., is the sole owner of the property attached herein, or whether the defendant Robert H. Hassler, Inc., has any attachable interest therein, and if so, what interest; and the said issue shall be tried at the same time as the trial of the issues in the original action herein, unless hereafter otherwise ordered by the Court. It is Further

Ordered, That the property herein attached may be delivered to the Hassler Sales Agency, Inc., the claimant, upon payment of all legal storage charges and its filing in this Court a bond to the plaintiff in the sum of Fifteen thousand dollars ($15,000.00) with surety to be approved by the Judge of this Court, or, in his absence, by the Clerk thereof, conditioned for the payment into this Court of whatsoever amount this Court may hereafter at any time find to be the value of the attached property which should be paid into this Court by [fol. 72] virtue of any subsequent order or judgment thereof; the said bond or any amount paid in pursuance thereof to stand in all respects subject to the same questions, rights and liabilities, as if the attached property had not been delivered to the said Hassler Sales Agency, Inc., but had been retained in the custody of the Court to be disposed of hereafter under the proceedings in this action and of the attachment. Provided that any negotiable receipt issued by Columbia Cotton Compress Company be also delivered up or if the same cannot be delivered, then proper indemnity therefor furnished.

It is further

Ordered, That if the Hassler Sales Agency, Inc., shall not within ten days from the date of this order file the aforesaid bond, so that the said property may be delivered to it, then that the plaintiff herein, David C. Shaw, shall file his bond to the petitioner, the Hassler Sales Agency, Inc., in the sum of Six thousand dollars ($6,000.00) with security to be approved by the Judge of this Court, or, in his absence, by the Clerk thereof, conditioned for the payment to the said Hassler Sales Agency, Inc., of whatever amount may be hereafter by this Court ordered and adjudged should be paid to the said Hassler Sales Agency, Inc., as representing any damage it may have suffered or may hereafter suffer by the detention from its possession, use and disposition of the property so attached and retained in the custody of the Court. Said bond to be filed within twenty days from the date of this order, or in default thereof, the said Hassler Sales Agency,

Inc., may move forthwith for the delivery to it of possession of the said attached property.

Henry A. M. Smith, U. S. District Judge.

May 25, 1920.

The case with the claim last above referred to, came on to be heard before the Honorable Henry A. M. Smith, and a jury, at Columbia, S. C., at the January term, 1921, whereupon defendant's attorneys [fol. 73] moved the Court to determine the question of jurisdiction raised by the pleadings in the State Court referred to, and in the first paragraph of defendant's Answer, in this Court, and the attorney for the Hassler Sales Agency of Richmond, Va., also claimed that the claimant represented by him was entitled to have the question to the at-ached property first considered and determined.

The District Judge held that both the claim of the intervenor and the main action should be tried together and the testimony heard before framing the issues.

Whereupon, an Exception was noted by the attorneys both for the defendant and for the claimant.

At the close of the testimony the Presiding Judge was requested by defendant's attorneys to charge the jury as follows:

COLLOQUY BETWEEN COURT AND COUNSEL

At the close of the testimony, Mr. Hyde called the attention of the Court to the question of jurisdiction, upon the ground that there was no title in the defendant to attach the property, and submitted that the entire testimony shows that the title had passed at that time to the purchasers and that the attachment failing because of the defect of title in the defendant, the Court had no jurisdiction.

Court: So far as the evidence shows, the outstanding receipt was at that time in the name of Robert H. Hassler, Inc., and under the Statute in the State of South Carolina the title could not pass without a transfer of that receipt: so upon the record of date of the attachment, title would have been in Robert H. Hassler, Inc. The second receipt has never been shown to have been surrendered, and is still outstanding.

Mr. Hyde: I would like to reserve that question.

Mr. Hyde moves to direct a verdict on the ground of lack of jurisdiction. Motion refused.

Court: (Reads the issues as framed.) See Record, page No. 39. [fol. 74] Mr. Mitchell: Objection and exception, as to the form of the issues as submitted to the jury, and next, your Honor, objection is made to the issue not being tried out first on the question of title as to whether the claimant here, the Hassler Sales Agency, Inc., was the owner of the property.

We would ask that your Honor would direct a verdict on an issue as to whether at the time the attachment was levied, the Hassler Sales Agency, Inc., was not the owner of the property attempted to be attached in the suit.

(Motion refused.)

Mr. Mitchell: And I would also submit that there is no testimony that the claimant was in collusion with the vendor.

Court: I am going to submit that to the jury.

Mr. Mitchell: Simply this proposition, if it was only for the purpose of defeating the attachment, that it does not affect the rights of the claimant. That is a legal argument, which I submit to your Honor.

Court: I shall hold that under the circumstances of the record, if the jury find that there was fraud, that there was a third interest involved.

Mr. Hyde moves for direction of verdict upon the main case, upon the ground that the entire testimony shows, and the only reasonable inference from the testimony is, that the plaintiff violated the terms of his contract with the defendant, giving the defendant, under the terms of the contract, the right to cancel the same, and therefore he cannot recover.

(Motion refused.)

Mr. Hyde: Then as to my proposed amendment as to the additional period, on which your Honor has not passed, I would ask that I be allowed to amend paragraph 4 of the answer (read paragraph 4) of the defendant Robert H. Hassler, Inc.

(Motion refused.)

[fol. 75] Court: In the opinion of the Court, there is no legal ground that such an amendment be allowed, at this stage of the cause, and nothing in the testimony appears equitably to entitle you to it.

Mr. Hyde reads request concerning parol agreement.

Court: Refused.

(Exception allowed.)

PLAINTIFF'S REQUESTED INSTRUCTIONS TO JURY

1. The jury is charged that a written contract may be modified by a subsequent oral agreement, and such an agreement, when made, becomes as binding as the original contract. It is admitted by both sides that the plaintiff Shaw on the 23d day of August, 1918, entered into a written contract with the defendant Hassler. This contract by its terms was to end on June 1st, 1919, and provided that the defendant Hassler might terminate it upon thirty days' notice. It would have been perfectly legal and competent for the parties to subsequently agree upon a different term, and if you find that they did subsequently agree *for valuable consideration in service rendered by Shaw* (italicized words interpolated by the Court) in lieu of the contract provisions, that the contract should remain in force for five years, *and from year to year thereafter, so long as the plaintiff Shaw continued actively to push the sale of Hassler shock absorbers,* (italicized words stricken out by the Court) such an agreement would take the place of the original contract provisions, and would be legal and binding, and the plaintiff Shaw would be entitled to damages for its breach.

Allowed as amended.

2. While it is true that a written contract cannot be varied by the terms of the oral agreements and negotiations leading up to it, for the reason that all verbal understandings are said to be merged in the written agreement, still the parties, after the execution of the [fol. 76] written agreement, may reinstate or revive their former oral understanding. Therefore, if you find that at the outset, the verbal agreement between the plaintiff Shaw and the defendant Hassler was to the effect that the plaintiff Shaw was to remain State distributor for the defendant Hassler for the term of five years and for year to year thereafter, for so long as he should actively push the sale of Hassler shock absorbers, and that the parties then entered into a written contract containing contrary provisions, and subsequently the parties verbally agreed that their previous oral understanding should supersede and take the place of the written contract in that respect, such subsequent verbal agreement would be legal and binding, and would have the legal effect of reinstating the understanding existing previous to the execution of the written contract.

Refused in toto.

3. The written contract between the plaintiff Shaw and the defendant Hassler contains the following stipulation: "It is further hereby agreed that the failure of the distributor (Shaw) to pay any draft within thirty days of the date thereof, is due and sufficient cause for the seller or manufacturer (Hassler) to cancel this contract, without notice, and without recourse whatsoever by the dealer upon the seller or manufacturer."

I charge you that this provision is intended for the benefit of the defendant Hassler, and that it was lawful and competent for such defendant to waive such benefit—that is, to relinquish the rights accruing to it, by reason of such provision.

Such relinquishment or waiver might be shown by any circumstances or writings which you find sufficient to show that, at the time, the defendant Hassler, with knowledge of the facts, elected not to rely upon this provision of the contract.

Allowed.

4. Such waiver might be shown by showing that the defendant Hassler continued to regard *and treat* (italicized words inserted by Court) the plaintiff as its distributor after knowledge of the alleged [fol. 77] breach of contract, *and take the benefit of his services.* (Italicized words inserted by Court.) *This circumstance, if you find it to exist, unless explained, would be conclusive evidence of waiver.* (This italicized sentence stricken out by the Court.) The attitude of the defendant Hassler toward the plaintiff Shaw may be shown by its letters and his actions, *which it is my duty to construe. I construe its letters dated March 25, 1919, March 11, 1919, February 25, 1919, and February 17, 1919, which Mr. Fouts testified were sent to distributors, as strongly tending to show that the defendant Hassler, at the time the letters were written, still regarded*

the plaintiff Shaw as its distributor. These letters are dated more than thirty days after the date of the draft in question. (Italicized words, beginning with "Which it is my duty to construe," stricken out by the Court.)

Allowed as amended.

5. Waiver might also be shown by the acceptance of benefits under the contract, after the time of its alleged breach, with knowledge of the facts constituting such breach. Under the contract, it was Shaw's duty to procure contracts with local dealers. The acceptance of such local dealer contracts by the defendant Hassler after thirty days from the date of the draft in question, with knowledge of the fact that such draft had not been paid, *would be conclusive evidence of waiver* (italicized words changed by the Court to read, "may be considered by the jury") unless explained. *I charge you further that the letters from the defendant Hassler to the plaintiff Shaw dated April 8, 1919, and Feb. 24, 1919, constitute such an acceptance.* (Italicized sentence stricken out by the Court.)

Allowed as amended.

6. I charge you further that if you find the defendant Hassler waived the forfeiture provision in question, it could not recall or rescind its waiver without reasonable notice and opportunity to the [fol. 78] plaintiff Shaw to pay the draft in question, and that there is no evidence here from which such reasonable notice and opportunity could be inferred.

Amended by the Court to read as follows:

6. I charge you further that Shaw was entitled to notice of the draft and opportunity to pay it, before any forfeiture for non-payment could accrue. That the defendant Hassler having notified Shaw the draft was forwarded through the Bank of Columbia, Shaw was entitled to look for the draft at that Bank, unless notified it was elsewhere.

Allowed as amended.

7. The plaintiff's right to recover in this case depends upon whether or not the defendant Hassler broke *its* agreement with plaintiff by wrongly terminating his distributor's contract. In case you find that the plaintiff Shaw is entitled to recover, the measure of his damages would be the value of this contract to him. This contract was worth to the plaintiff Shaw the profit he would have made out of it, but for the act of the defendant Hassler. The loss of this profit is a proper element of damage in a case like this, where profits were the direct and immediate fruits of the contract.

The plaintiff, in a case of this kind, is not bound to furnish you with an exact statement of his damage. It is enough for him to show you all the facts and circumstances surrounding the trans-

action, and from this it is your duty to estimate his loss. (This italicized paragraph stricken out by the Court.)

Allowed as amended.

8. In awarding damages, therefore, if you conclude the plaintiff Shaw entitled to recover, you may consider any testimony that may have been brought out as to Mr. Shaw's knowledge and experience with regard to the Ford automobile and shock absorber business in South Carolina; his knowledge of the dealers handling these [fol. 79] commodities; his standing and influence in the trade.

You may also consider any testimony that may have been brought out as to Mr. Shaw's opportunities to sell shock absorbers; the character of the commodity itself; the demand for it; the number of Ford cars in use in South Carolina; the sales' possibilities of the shock absorbers; its general use; its place among its competitors.

You may also consider Mr. Shaw's experience in the sale of the articles; the condition of the market when he began to sell it; whether this condition grew better or worse; the number sold by Shaw, and the number sold since, and the profit on each sale.

You may also consider any representations which may have been made by the defendant Hassler as to the sales possibilities of the commodity and the profits to be realized therefrom.

Refused in toto.

(Plaintiff excepts to refusal to charge in manner and formed as asked. Exception allowed.)

(Mr. Hyde, on behalf of defendant, excepts to requests of plaintiff to charge, as granted. Exception allowed.)

DEFENDANT'S REQUESTED INSTRUCTIONS TO JURY

(By Mr. Hyde:) The jury is instructed that in so far as the alleged parol agreement to extend the period or term mentioned in the written contract is concerned, the burden is upon the plaintiff to show that the sales manager Mr. Fouts, was authorized to make such a contract for such extension; and if the plaintiff has failed to show such authority in said sales manager, Mr. Fouts, the plaintiff cannot recover anything by reason of such alleged parol agreement for such extension.

Refused. Exception allowed.

[fol. 80] Court: I shall charge the jury that it is for them to say under all the circumstances of the case, the correspondence and the actions of Hassler's agents, whether the correspondence shows that the only person who dealt with Shaw was this man Fouts. All the letters are signed by Fouts for Hassler; and that if the jury find from the testimony that Fouts with whom he dealt at the first, from all those circumstances was authorized to act for Hassler and that Shaw

and Hassler by parol made the claimed alteration in the contract, whereby to the extent of at least five years he was to continue, that, under the pleadings and evidence in this case, would bind him.

I shall charge the jury further: Hassler, the defendant, claims his right to terminate the contract by reason of Shaw's failure to take up the draft. In the first place, under the terms of the correspondence, notifying him of the drafts and also under the terms of the contract, Shaw was entitled to have notice of the draft and opportunity to take it up, and having been notified that it was forwarded through the Bank of Columbia by the Hassler Co., the defendant company, itself, he was entitled to wait until that Bank received the draft, unless he was notified that the draft was sent to some other Bank, and that it was his duty to attend to it. That while he may have had the privilege of giving a certified cheque and taking up the car in lieu of producing the bill of lading, after having paid the draft, he was not bound to do so; especially not bound without any notice from Hassler that the draft was here unpaid, and requesting him to take such action; and further, that it is for the jury under all the circumstances of the case, whether at that time (the draft having been sent according to Hassler's written notice on the 11th January) there had not been a waive by Hassler under the circumstances of the case, of his right to terminate the contract by the non-taking up of that draft. That if he knew it was not paid and he allowed this man to go on and continue his services, accepting him as agent, giving him no notice (there is no notice here) that Hassler would exercise the right to terminate for the non-payment of the draft, (the only notice is on the 23d of April, that they had made other arrangements)—that though under the contract, Hassler was [fol. 81] entitled to terminate it without notice yet that where his actions showed (if the jury find that they did) that he did not intend to terminate it, without notice, hu- waived or relinquished his right to do so, then the contract continued.

On the question of damages, I will charge them that they are not entitled to consider uncertain testimony as to what could have been sold in the future. That this contract bound him to accept five thousand sets a year, upon which the testimony is his profit would have been $2.50; that is, over the manufacturer's price. That the evidence shows that he had taken one thousand, which left only four thousand; and that if the jury find that the contract was renewed, he would be entitled to the five thousand for the five years. But that he is not necessarily entitled to $2.50 for each set of shock absorbers. The jury are obliged to take what in their opinion is a reasonable cost to Shaw of conducting his business, which he failed to conduct after its termination, and that he would be entitled first to $2.50 under any circumstances on the four thousand sets of shock absorbers, less the cost of conducting his business, which under the testimony will have to be estimated by the jury.

And then, if they find that this oral extension was agreed upon, knowingly and intentionally agreed upon, in consideration of Shaw's services, that they could find in addition, not exceeding $2.50 upon

twenty thousand sets, deducting the cost of Shaw's conducting his business.

On the matter of the plea of collusion, I shall instruct the jury that in these things, it is for them to say if there was collusion in this matter between Robert H. Hassler, Inc., and Hassler Sales Agency, Inc. If there was, the construction of the effect of that receipt and the question of title would be a legal conclusion, which would be determined by the Court.

COURT'S CHARGE TO JURY

MR. FOREMAN AND GENTLEMEN OF THE JURY: This case has consumed a great deal of time and there has been a mass of testimony taken, but when we get down really to the issues you are to decide, you will find they are not so broad after all.

[fol. 82] It was brought originally by this plaintiff David C. Shaw, who sues Robert H. Hassler, Inc., a corporation, to secure damages for a breach of contract.

(At this point, the Court reads Mr. McKay's Request to Charge on behalf of the defendant, as follows:)

I charge you, that if you should find that the shock absorbers here attached were the property of the Richmond concern, your verdict would be for the defendant, since this court would have no jurisdiction of the defendant, Robert H. Hassler, Inc., if the property were not theirs.

Norfolk So. R. Co. vs. Furman, 244 Fed. 353, 357.

Refused. Exception allowed.

Now, the Hassler Company, as to its place of residence, as from all the evidence you have seen is in the State of Indiana, and the fundamental law is that you cannot sue a man unless you sue him in a place where he can be served; so that the plaintiff could not serve him here, unless he could lay hold of some property of Hassler's in the State of South Carolina. He could then sue it, and up to the extent of the value of that property, he could recover judgment; and when he sued him on the 5th day of May, 1919, and attached this lot of shock absorbers, which were then on deposit at the Columbia Compress Co., he could recover judgment to the extent of Hassler's interest in them.

He sued Hassler for damages for breach of contract, and what we call in law, attached these shock absorbers to answer the judgment, should he recover; attached this carload of shock absorbers which were on deposit.

At this stage of the case, another concern claiming to be a wholly separate concern, a wholly independent corporation, called the Hassler Sales Agency, Inc., a corporation of the State of Virginia, residing in Virginia, came into Court and said "I know that those

shock absorbers that you have attached as the property of Robert H. Hassler, Inc., are not the property of Robert H. Hassler, Inc. They belong to us, and we come into court and claim that they belong to us."

[fol. 83] Now, you see, that is true, that as to the Hassler Sales Agency, if it be an independent corporation, the question is then whether these shock absorbers did belong to Robert H. Hassler, so that Shaw could subject them to the payment of his debt. For, if they did belong to Hassler Sales Agency, why of course the Hassler Sales Agency was entitled to them. But that (as you will see when I refused a request that I read just now)—that has a bearing on the case incidentally, because if the Hassler Sales Agency are the owners of this property, and if they are the owners they are entitled to them, no matter what the consequences may be. But if they are the owners why, then, Shaw has not attached any property of his debtor, that he could subject to the payment of his debt; and as we say in law, there is no jurisdiction for trial in this Court. It will have to go to Indiana, or any other State where he could sue them.

So that you see that although the issue between the Hassler Sales Agency and Shaw as to the ownership is one thing, the Hassler Sales Agency—if they are the owners, are entitled to them; no matter what consequences may follow, if they are really the owners. But the effectuation of title in them means necessarily then that Shaw would have no property in this State upon which he could base a judgment, to subject to his claim upon Robert H. Hassler, Inc., of Indiana; if it was an issue in the case. The testimony necessarily under those circumstances in each case was—(a great deal of it, at least)—would bear upon the two cases, and upon the direction of the Court they have been tried together.

As to the first case, David C. Shaw vs. Robert H. Hassler, Inc., an Indiana corporation: It appears that Shaw went to Indiana, the headquarters of the corporation; alleging, now, among other things, that he was solicited to go there; and there are expressions in their letters asking him to go to see them; but that does not make any difference as to the legal rights. In the beginning of a contract, either man may ask the other, and there may be a whole lot of discussions. Because I may ask a man to buy my land, that does not mean that if we do not agree upon a sale, that I am under any obligation to him. So, he may come and thrust his horse upon me, [fol. 84] and if I do not agree to buy the horse, I am under no obligation to him, nor he to me.

Those are really unessential matters. The essential matter is that he did go to Indianapolis and there he met and dealt with this witness you have heard spoken of as Fouts; who assumed to deal and act for the Indianapolis corporation, Robert H. Hassler, Inc. They came to an agreement, which agreement was put in writing, printed, or some in typewriting, and signed by Shaw, and afterwards signed by Hassler.

I charge you that that written agreement is a written agreement, and people must perform their written agreements. But they are not to make a foolish agreement, as this may have been—very

foolish agreement for Shaw to make, and then disavow it. But if they make a written agreement, then in any Court of Justice they are to perform their written agreement; and they are not allowed to back out because it may be a hard one.

It appears from the testimony that that form of agreement which he signed in blank, as he says, did at the time contain in printing the clause of provision that that should be terminable on thirty days' notice, and should last only a year. There is no filling up to change that, because that is in the agreement. The only blanks left to be filled up were about other matters. That was the agreement, and however he may have understood it otherwise, men when they sign such an agreement must advise themselves of what they sign. They must not sign and then come and say, "Oh, I didn't understand that the same way."

It is true, that a great advantage is sometimes taken of men in that way; but it is necessary in human law that a man should be held to what he does. A copy was not sent to him. All he signed at that time was a blank and a shipping schedule. The agreement was not to become binding until Hassler signed it. Shaw signed it, and Hassler had not signed it. Shaw signed the shipping agreement, stipulating how the shock absorbers contracted for should be shipped, and which upon the face of it, recognized that he was to take a certain number at a period ending the 30th June of the next year, 1919.

Well, now, Shaw says he went home, and that his obligations under that contract required him to do a great many things. He had to give up his Ford representation, and he had to prepare to [fol. 85] engage a number of assistants and prepare to have branches, or representatives, all about, and to do what is called advertise and push, circulate, and everything to effect sales of those shock absorbers, which he was to sell. That requires a great deal of money, so he says, and time, comparatively of course. He established a place in Columbia and one in Sumter. You have heard his recital of what he did, which he claims to have done in good faith, in arranging to sell and ordering the shock absorbers.

The evidence is that this contract as signed by Hassler was not forwarded to him until early in November—November 8. His contract was dated 23d August; but the contract with Hassler's signature, which was necessary under the terms of the contract to give it validity and make it binding on Hassler, was not forwarded to Shaw until the 8th of November—after he says he had done all that which he has recited towards carrying it out; and, as he avers, in good faith relying upon an understanding as to an extension, which I next charge you was not binding as not in this contract; but that when he received it in November he found that it did not contain that provision for an extension which he thought was necessary to protect him, so that when he had done all this work, he should not be cast aside like a sucked out orange, for the other to derive benefit from, but that he should be entitled to it.

He says he was not willing to take all that trouble and be cast aside; and upon that, as soon as possible he personally went back

to Indiana, to have an understanding and alteration; and the undisputed testimony is that he did go back to Indiana.

Then begins a sharp conflict of testimony between himself and the witness Fouts, even as to the first time of meeting. Shaw says he met Fouts in the street driving in an automobile. Fouts said Nothing of the kind; he met him in the lobby of the hotel with two other men. Somebody's memory, even though as to incidentals and not very material details, is at fault.

The first thing for you, gentlemen, to consider is, what passed between them. That is a matter for you to decide because it depends upon whom you believe. There is a sharp conflict of testimony between these two witnesses. Shaw says he went there and stated to [fol. 86] Fouts who then assumed to talk for Robert H. Hassler, Inc., as he had acted before, and was the only man, according to Shaw, he had seen about it. He stated to Fouts his objections and Fouts heard him and recognized him, and then there agreed that he should have an extension. Shaw fixes that extension at five years and thereafter, as long as it could be pushed. I charge you that in this agreement, "as long thereafter as you can push it," is too indefinite at law. But an agreement to extend for five years is a definite agreement, if it be established to your satisfaction. There is a conflict between them. Fouts says nothing of the kind occurred. You are the judges of the weight of the testimony, of the credibility of the witnesses, the weight of the circumstances. It is for you to say whom you believe between those two.

It seems to be beyond doubt that Shaw went there, although the testimony is not that he went there altogether for that purpose; because I understood him to say he came over from Detroit, so that he must have had some other business in the northwest; but if he had other business, it is for the jury to say whether he should have gone over to see Robert H. Hassler, Inc., at its headquarters in Indianapolis and for what purpose, unless it was for the purpose he states. That is only a circumstance in his behalf, either to corroborate or to refute his testimony; and beyond that it is just a direct conflict of testimony; and where there is a direct conflict of testimony I charge you it is your jurisdiction and your privilege to decide who is telling the truth. If Shaw is telling the truth, there was a direct agreement between himself and the representative of Hasslers, Inc., that this contract should be modified to the extent that instead of its being terminable on thirty days' notice, or within a year, it should extend to five years; and Fouts declares that there was nothing of the kind, that he simply consulted him about some matters about the business.

Who is telling the truth? That is for you.

Under the circumstances, Shaw came home, according to the testimony; and then, according to his testimony (you have heard him testify; I won't recapitulate more than is necessary) he took one cargo of shock absorbers and then there was another car to be shipped in January, which Hassler undertook to carry for a certain time, and which he desired them to carry for him a further time, up to

[fol. 87] the first of March, and they refused; notifying him they were going to ship, and he must look after his shipment. And they did ship the carload of shock absorbers on January 11, at least the invoice is dated that date. They invoiced them for him, told him they had drawn on him for them, and that the draft was drawn through the Bank of Columbia; that being the bank which he had instructed them to draw drafts on him through. Exactly when that carload—what date it arrived—it seemed it was in February,—Shaw (I think the 11th of February) admitted that he knew the carload was there. He telegraphed them that he would look after them, February 6th. Hassler wired him, "Have you received the car, etc." On the 7th he answers, "Your telegram. Car arrived. Will take care of draft."

He was advised that that draft was to come through the Bank of Columbia, and he testifies that it never did come through the Bank of Columbia; that he was never notified of the arrival of any draft. That he used due diligence to find where the draft was and ascertained about the 1st of March that it had been in the Carolina National Bank, a wholly different bank, and had been returned and that he was never notified of that draft.

Now, gentlemen, on that I charge you that according to the contract he had made, by which both sides were bound, that it was agreed that the failure of the distributor (that is, Shaw) to pay any draft within thirty days of the date thereof, is due and sufficient cause for the seller and manufacturer to cancel this contract without notice and without recourse.

I will charge you that under that, that means a failure of Shaw to pay that draft after it had been properly drawn to and remitted against him, and he had notice of its existence. Otherwise, you can see that the other party to the contract, by concealing the fact of the existence of the draft, the place where it was, might lay a trap for the man by which he would lose his contract, because he was unaware of the draft. For that purpose Hassler notified Shaw that the draft was sent through the Bank of Columbia, and if sent through any other bank it was their duty to advise him to that effect. For, if he had received notice of it through any other bank, or been in any other way advised about it, it was his duty to take it up; but you have heard his testimony—whether to be-[fol. 88] lieve him is for you—in which he says that the draft was not sent through the Bank of Columbia, and that he never knew or heard where the draft was until after it had been returned.

I charge you that even the mere failure to take it up is not necessarily an abrogation of the contract. It is due and sufficient cause for the seller or manufacturer to cancel the contract, and so that it was within the power of the seller, even if the draft had not been paid when it should properly have been paid, that was only a right. Hassler was not bound to cancel the contract; but if he did cancel the contract he was bound to notify the other man that he had cancelled it. Not to let him go ahead under the assumption that the contract was in existence, but to notify him.

He could not even, if Shaw had failed to take up the draft, lie by and allow Shaw to go indefinitely on. He might have allowed Shaw to work for months and then said, "I cancelled that contract because you did not take up the draft a year ago." That is not the intention of the contract; and while Shaw is to be held strictly to the contract, both parties are to be held also. Both parties are expected to deal honestly and fairly, and in a Court of justice, a man who does not deal honestly and fairly is the man in the wrong.

In this case, while the failure, even if Shaw had failed to take up the draft when he properly should his failure to do so, while it might have been sufficient cause to authorize the cancellation, yet that the contract must have been cancelled so as not to permit the other person to go on under the assumption that it was not cancelled and the fellow who chose subsequently to cancel it, received the benefit of it.

It amounts to what in law is called a waiver, where a man has a right to declare a contract or deed cancelled, but he does not exercise that right but allows the other party to go on; and where as if it was still existing, knowingly he allows him to do it, he cannot then go back and say, "Yes, now I will exercise the right which I had a right to exercise, months ago."

So that I charge you therefore, first, that this man Shaw is not derelict under that contract, unless he had notice that this draft was not in the Bank of Columbia, where he could take it up; and [fol. 89] then I charge you even if he was derelist in not taking it up, if the other side did not then and there exercise the right to cancel, but permitted Shaw to go on and dealt with him as if he were still a party to the contract, and received the benefit of his labors, then it is within the power of the jury to say that he did not intend to take advanage of that right to cancel it, and waived it.

You have heard the evidence on that. There have been put in evidence letters here, showing that Shaw was forwarding contracts and receiving them; and defendant could not equitably be in the position that Robert H. Hassler, Inc., for the course of business insisted in the letters that Shaw should go to his sub-agencies, and his sub-agencies would execute contracts directly with the Hassler Co., Inc., saying how much they would take. Then those contracts would be sent to Hassler, Inc., for Hassler could not be in the position of Shaw going around and getting a whole lot of sub-contracts from people who had contracted with Hassler and, when Hassler had garnered in those contracts from other people, then say the contract had been cancelled. By his contract with Shaw, he could not do that fairly, especially if he did it after the date when he had a right to cancel upon his theory that the draft had not been paid.

Upon the two crucial points of the case, it is for the jury to say whom you believe, Fouts or Shaw, as to whether that contract was modified so as to be a five-year contract, and next, it is for you to say whether the right to cancel was ever exercised or if Hassler waived it. For nothing is communicated to Shaw in the nature of a cancellation while they are still receiving his com-

munications and contracts until the 23d of April, when they notified him that they had made other arrangements; not that his contract is cancelled; only inferentially, but simply that they had made other arrangements to market shock absorbers in South Carolina.

Now, if you find that the contract was modified or not modified, if you find that Hassler never terminated this contract, or that he was not entitled to terminate any contract, because Shaw had never duly failed to take up the draft, then I charge you Hassler's action was a breach of the contract, and Shaw is entitled to recover due damages.

[fol. 90] What are those damages?

Under this contract, if you find that there was no alteration—if you believe Fouts and find that there was no alteration, then Shaw bound himself to receive and was entitled to receive, five thousand complete sets. He received one thousand, under that contract, so there are only four thousand left; and he testifies that, and so does the other witness, Davis as to the agreement in Richmond. I don't think there is any contradiction that his profit, or allowance, on each set, was $2.50; on four thousand sets, $10,000; but he is not entitled to receive that, because out of that he was to pay the expenses of the conduct of the business; as to which there is very little satisfactory testimony, so that the jury must estimate accordingly. As soon as he was notified by the other side that they were not going on, it was his duty to restrict the expenses as much as possible.

When Hassler notified him on the 23d of April that he was not going to handle the shock absorbers any more, why, it was Shaw's business to restrict his expenses so that he would only recover out of that $2.50, so much as he would have had if his expenses had gone on. If I may illustrate it, assuming that he got $2.50 and that it cost him $1.50, with all of his submen—he didn't pay his sub-contractors, because they got a different amount; but a man like Ingram, he pays rent, etc. If he made one dollar clear, why, then it was his duty, so as to—when he knew it was done, not to go on, and get the $2.50, but to restrict his expenses so far as he could, as he would still make the dollar; as that was all he was entitled to get, if he went on exactly what he was entitled to get.

Gentlemen, I can't say from the testimony—you have to say it, so that in any event, I charge you if you find whether he found that the contract was extended or not—If you find that Shaw had no notice of this draft that it was in Columbia, and did not fail after proper notice to take it up, or if you find that the other side waived that, then you will in any event find for Shaw, the profit that he would make upon four thousand sets. It cannot be as much as $2.50 per set, because you must take from that the expenses.

If you find, in addition to that, that they did agree to extend it [fol. 91] for five years and not carry beyond that, why then, you will find in addition, the profit upon twenty thousand sets, but less what Shaw's expenses would have been.

In other words, if he only got net one dollar, then you will find for him $20,000.00. That is all he got out of it. You can't find the whole $2.50, because he evidently had some expenses; so you will deduct whatever from the testimony appears to be the proper deduction to allow. In any event, you will find for him $2.50 on four thousand sets, less what his expenses would be from the sale of that four thousand sets; and if you find the contract was extended, you will find in addition $2.50 on twenty thousand sets, less what you find would have been his expenses of sale.

So much for the first case.

Next is the case of the issue propounded by the Hassler Sales Agency, claiming this property; and if this claim is good and you find they are entitled to the property, you need not bother yourself about how much Shaw should get, because there is no property here to pay him, and that will be the end of the business. In such a case, where the judge thinks there is not enough evidence to go to the jury, he so states. In this case, I am going to send it to you, because of the circumstances; because I think it is your province to find out whether from this title claimed, the party claiming it is really entitled to it, or whether there has been any fraudulent collusion. But so far as Shaw is concerned, as to the right to claim it, on that I charge you that whatever other questions may exist as to this negotiable receipt or otherwise, it is a question of law for the Judge to determine that; but the question of fact which I am going to submit to you is as to the fraudulent or collusive action, if any, which deprived these people of their rights.

The reason why I submit it to you, is because the inferences to be drawn from the circumstances are for the jury; and the circumstances which impel me to do it in this case are the following:

This draft went back in February and these shock absorbers, were deposited, not carried back to Indiana, but deposited in the city of Columbia with the Columbia Compress Co. There has been put in [fol. 92] evidence no subsequent action, telegrams or letters from Hassler, Inc., to Shaw, with regard to this matter, either urging him to take those or not. It was simply deposited here, and not until April the 17th or 18th, or thereabouts, did Shaw telegraph to say that he was waiting for the draft, and waiting to take it up; to which they seem to have returned no answer. He telegraphed again that he was ready to take up the draft and to that, they seem to have returned no answer.

This man Fouts, according to his testimony, did later, on the 23d of April, send, I think (according to the testimony) from Newark, this letter, that he had made other arrangements; but prior to that it appears that Fouts and another officer of the Company went to Richmond. Nothing was said to Shaw; and when in Richmond, they had this meeting that you have seen, with Mr. Davis, afterwards an officer of the Hassler Sales Agency, which resulted in their transfer or attempted transfer to a corporation to be formed of these shock absorbers in Columbia.

Now, gentlemen, fraud has almost always to be determined by circumstances. People who commit fraud don't go out and say that

they have committed fraud! They commit fraud covertly. You can't establish fraud by the testimony of the man who did it, because he is not going to testify; so in all cases it has got to be established by circumstances, and the circumstances which impel me to submit it to the jury are that there was this Company in Richmond, which had a capital of $1,500; two officers of the Company from Indiana were there, Fouts and Woods. They then came to them, and the result is, that this corporation (if it was done bona fide, it is all right. I am simply reciting the circumstances—$1,500 capital) came and bought nearly $10,000 worth of shock absorbers in Columbia. That being just anterior to the notice that Fouts subsequently gave Shaw, that he had no further use for him; and so, as far as Fouts was concerned, it was done anterior to the time, very shortly, where a notice to Shaw would put Shaw upon his guard.

Now, these persons went and bought it, and according to the testimony of Davis himself, they bought (that is, this Company of $1,500 capital) bought nearly $10,000 worth of shock absorbers in South Carolina; for which they paid cash, without knowing any [fol. 93] more about it than just what he says Fouts told him—committed himself, he says, to the payment for them in cash, cash paid on the 2nd May, without knowing anything about anybody except what Fouts told him.

He says that he did not know that there was an agent in the State of South Carolina. All that is for the jury to say whether the very fact of that carload of shock absorbers in Columbia was not notification to him that there was an agent—all that is for you.

At any rate, he bought this car of shock absorbers and reorganized this company with the same officers that existed before; but it received a letter dated the 25th, with draft drawn when there was no such company as the Hassler Sales Agency. It was not actually put in shape and incorporated until subsequently. They received an order to deliver to Hassler Sales Agency, authorizing draft of $10,000, when at that time there was no such company. Whether that be tokened haste, or anxiety, is a circumstance for the jury. And that after that, they paid for this thing, but took no steps to take possession, although they paid cash further than the transfer of the property, and intending as he said, to do nothing about until July, when he might need it.

Those are the circumstances. When they appear in a case, they are proper circumstances for a Court to submit to a jury; and I think in a case of this kind they should be submitted to the jury.

And if it is that these people are entitled to it—you have heard the testimony of Davis. He was carrying on a small company and says he did not know anything about it; and he said: "Yes, if you will give me South Carolina, I will buy that carload down there."—and then they told him they didn't like the name and he said, "We will change it to the Hassler Sales Agency and enlarge our capital."

That is his testimony, and if you believe him, that would give him a discharge. But that peculiar thing, as to whether you believe a witness or not, is for the jury. Davis, if you believe him and his testimony, would effect a total discharge; why, then, he would set out

a plain business transaction, because although the circumstances are such as should put him on inquiry, that is not the issue here. In [fol. 94] your opinion, circumstances must be so strong here as to satisfy you that Davis or somebody else in the future corporation called Hassler Sales Agency, knew that the Robert H. Hassler, Inc., company intended to make this transfer for the purpose of defeating the claims of Shaw and that they co-operated, knowing that, and colluded with them to carry out that scheme.

That is the issue submitted to the jury. You have heard all the testimony. It is for you to say; and I will submit it to you on these issues:

There are three issues. I have left space for you to write Yes or No below each of them. (Reads issues as framed.) You must answer to each one of them Yes, or No.

On the question of damages in the main case, you will write on the back of this paper in blue. If you find that this man failed to take up the draft when he should, you will say, "We find for the defendant." If you find that he did not fail in that respect, but that the contract was never extended, you will say, "We find for the plaintiff so many dollars,"—writing it out in words, not figures, and signing your name as foreman.

If you find that the contract was not extended, you will limit yourself to $2.50 on the four thousand sets, less his expenses. If you find, however, that it was extended, you will say, "We find for the plaintiff so many dollars," limiting yourself to twenty thousand sets at $2.50, less the expenses of carrying on the business.

Mr. Hyde: I will ask your Honor to charge the jury that even if they find it was extended five years, it was extended in all respects as to the original contract. The only difference is as to the duration.

Court: I charge you that. It was as before, except as to the duration.

Mr. Hyde: I except to the charge upon the subject of the modification of the written contract in manner and form as charged; also to the question of cancellation in manner and form as charged, and upon the question of waiver, in manner and form as charged.

Mr. Mitchell: I would like to note an exception in regard to the charge of your Honor, that I understood your Honor to decline the request to charge them in regard to jurisdiction; but I understand [fol. 95] your Honor to charge the jury that their finding here—if they find that the property was the property of the Hassler Sales Agency, that then there would be no jurisdiction.

Court: Why, certainly, that is what I am asked to charge; but that is the act of the Court and not of the jury.

Mr. Mitchell: I understood your Honor to charge them that in considering their verdict and passing upon it, that the question——

Court: I charge you that was only incidental, and I charge you that again: If the Hassler Sales Agency established, in your opinion,

its right to this property, it is entitled to a verdict for it, notwithstanding what the incidental consequences may be.

Mr. Mitchell: That is just the point I was excepting to, in your Honor's charge.

And also upon the question, in your Honor's charge as to the bona fides and good faith on the part of both parties to the transaction. In other words, that if the Hassler Sales Agency was acting in good faith, it would not make any difference what was the territory or object——

Exception noted.

Court: I have already charged them that, very distinctly: That is the Hassler Sales Agency was acting in good faith.

Mr. Clifton: If the jury should find that the Hassler Sales Agency owned the property, would they not still go further and find damages and leave the question of jurisdiction to your Honor?

Fourth: If they find that the Hassler Sales Agency owned the property, they need not find anything else.

Mr. Clifton: We will ask your Honor to allow them to find the damages in any event, and leave the question of jurisdiction to your Honor.

Upon this trial the jury failed to agree and a mistrial was ordered, and the case came up again for trial.

Before the trial began, defendant's attorneys asked the Court [fol. 96] to try first the questions arising under the claimant's intervention and the Hassler Sales Agency insisted that the issues raised by the claimant should first be disposed of.

The court held, however, that inasmuch as much of the testimony would have to be repeated upon the trial of each of these issues, the Court would first try the main case, being the action for damages, for if no damages should be found against R. H. Hassler, Inc., the trial of the issue as to the ownership of the property and the validity of the attachment would be unnecessary.

At the opening of the case the Court was requested by both sides to frame issues to be submitted to the jury. This request was refused, the Court stating that the testimony would be heard before framing issues.

To this ruling, Messrs. Rutledge & Hyde excepted on behalf of R. H. Hassler. Inc.

Thereupon the case proceeded, and after the taking of the testimony presented by both sides, the argument of counsel, and the charge of the judge resulted in a verdict of Fifteen thousand dollars ($15,000.00) against the defendant R. H. Hassler, Inc.

Subsequently, the issue as to the title of the property hereinabove referred to was tried, and the same being adjudged against the Hassler Sales Agency, the Court by Judge Smith, as follows:

DECREE

An action at law in this matter was begun in the Court of Common Pleas for Sumter County by the plaintiff David C. Shaw, against Robert H. Hassler, Inc., and the Columbia Compress Company, on the 5th day of May, 1919; Robert H. Hassler, Inc., being a non-resident corporation, incorporated under the law of the State of Indiana. On the same date that the action was commenced an attachment was duly issued again- the property of Robert H. Hassler, Inc., and on the same day, May 5, 1919, the Sheriff of Richland County duly returned that he had that day levied upon and seized one carload of Hassler Shock Absorbers, the property of Hassler Sales Agency, Inc., in the hands of the Columbia Compress [fol. 97] Company. The Columbia Compress Company was only a formal party defendant as the bailee of the goods attached.

Thereafter the defendant Robert H. Hassler, Inc., moved before the Court of Common Pleas for the County of Sumter to set aside the service of the summons and complaint herein for want of jurisdiction on the ground that the said Robert H. Hassler, Inc., had no agent or officer or other person residing within the jurisdiction of the said State upon whom any service of process could be made. The notice stated that Robert H. Hassler, Inc., appeared only for the purpose of moving to dismiss, and set aside the alleged service of process, and expressly restricted its appearance to the purpose of moving to set aside the same.

The motion having come on for hearing in the Court of Common Pleas for Sumter County, the Presiding Judge of that Court on the 31st day of May, 1919, made an order denying the motion to set aside the service. Thereafter, on the 2nd June, 1919, the defendant Robert H. Hassler, Inc., filed its petition and bond for removal of the action in the State Court to this Court, on the ground that there was in the case a controversy wholly between citizens of different States; that is to say, between the plaintiff, David C. Shaw, a citizen of the State of South Carolina, and the defendant Robert H. Hassler, Inc., a citizen and inhabitant of the State of Indiana; and upon said petition and bond for removal, the transcript of the record was filed in this Court.

Thereafter on the 3d September, 1919, the defendant Robert H. Hassler, Inc., filed its answer in this Court, setting up that on the 24th May, 1919, it had entered a special appearance in this action for the sole purpose of moving to set aside the service of the summons upon that defendant, and upon motion to have the same set aside, the motion had been refused by the Hon. John S. Wilson, Presiding Judge, in the State Court, and in the order he reserved the right to the defendant to set up such special defense in its answer as to the jurisdiction of the Court as it might deem advisable, and alleging that this Court had no jurisdiction over the defendant, because it had no agent within the State of South Carolina, upon whom service could be made, and it had no property [fol. 98] within the State of South Carolina upon which an attach-

ment could be legally levied, so as to give the Court jurisdiction, and further proceeded and answered fully on the merits reserving its rights to object to the jurisdiction as aforesaid.

Thereafter on May 14, 1920, the Hassler Sales Agency, Inc., a corporation under the laws of the State of Virginia, filed its claim in this Court alleging that the property levied on, to-wit, 220 boxes of Hassler Shock Absorbers, was at the date of the attachment proceedings, the sole property of the said Hassler Sales Agency, Inc., and was not the property of the defendant Robert H. Hassler, Inc., nor subject to the levy of any attachment in any action against Robert H. Hassler, Inc., and praying the delivery of the said 220 boxes of Hassler Shock Absorbers to the claimant; and on such claim being filed, an order was made on May 25, 1920, reciting that this claim had been made, which claim was traversed by the plaintiff, David C. Shaw, and which claim and traverse presented an issue as to the ownership which should be tried and determined in this Court.

The claimant sought to have the issue as to the validity of the attachment tried first, but inasmuch as it seemed to the Court that under the pleadings, much of the testimony would have to be repeated on each trial, and that it would be best, in the speedy administration of justice, that it should be first determined whether the plaintiff could recover any judgment at all against the defendant Robert H. Hassler, Inc., that issue was directed to be tried first.

Thereafter, at the November, 1921, term of this Court, the main cause herein, between David C. Shaw, the plaintiff, and Robert H. Hassler, Inc., the defendant, came to trial before the Court and a jury, and a verdict for Fifteen thousand dollars ($15,000.00) in favor of the plaintiff David C. Shaw, and against the defendant Robert H. Hassler, Inc., was rendered by the jury: as to which no new trial has ever been granted, nor has any appeal or writ of error therefrom been taken.

Thereafter, at the November, 1922, Term, the issue as to the claim of the Hassler Sales Agency, Inc., to this property came on to be heard, upon which issue there were two questions; one as to whether or not the alleged transfer from the defendant Robert H. [fol. 99] Hassler, Inc., to the claimant Hassler Sales Agency, Inc., was made fraudulently and collusively, to the knowledge of the Hassler Sales Agency, Inc., to defeat the rights of the plaintiff, David C. Shaw, and the other question being as to whether, upon the facts in the case, the attachment levied on the 5th day of May did not take precedence of any transfer shown by the testimony to have been made from the defendant Robert H. Hassler, Inc., to the Hassler Sales Agency, Inc.

The issue as to fraudulent collusion between Robert H. Hassler, Inc., and Hassler Sales Agency, Inc., was by the Court referred to a jury and upon the trial of this issue, in the opinion of the Court, no sufficient evidence was adduced upon which the jury could base a verdict that there was any such collusion shown between Robert

H. Hassler, Inc., and the Hassler Sales Agency, Inc., as would upon that ground alone, as against the plaintiff as a matter of fraud, invalidate the alleged transfer, and the issue was therefore withdrawn from the jury; which left for decision by the Court the question whether or not, under the facts of the case, as shown in the testimony and the pleadings, the attachment herein levied on the 5th May, 1919, took precedence of any prior claim of transfer from Robert H. Hassler, Inc., to the Hassler Sales Agency, Inc.

This matter has been fully argued upon the pleadings and testimony by counsel for all parties interested. It appears from the testimony that David C. Shaw had been the agent of Robert H. Hassler, Inc., for some time prior to the 21st April, 1919. It was upon the relations and contracts existing between David C. Shaw and Robert H. Hassler, Inc., prior to that time that the claim of the plaintiff in this action was founded, in which the verdict of the jury was for $15,000.00, in favour of the plaintiff David C. Shaw.

On the 21st Apil, 1921, without notice of any kind to David C. Shaw, the defendant Robert H. Hassler, Inc., through its officers, made an arrangement in the City of Richmond with Thomas B. Davis and others to act as its agents for the sale of Hassler Shock Absorbers in South Carolina. At that date, Thomas B. Davis and the others were occupied in carrying on business under the name of Southern Accessories Company. Prior to that date, Robert H. Hassler, Inc., had shipped to David C. Shaw at the City of Colum- [fol. 100] bia, South Carolina, this carload of shock absorbers and drawn a bill of exchange or draught to cover the cost, but which bill had never been taken up by David C. Shaw, owing as he claimed to the fact that he had no notice of the bill of exchange to which the bill of lading was attached, and which was sent to a different bank for collection than the one agreed on, and which bank had never given him notice of its presence there for collection.

At any rate, the carload of shock absorbers had remained in the Railway car in the City of Columbus until February 4, 1919, when the Railroad Company delivered the shock absorbers to the Columbia Compress Company for storage so as to release this car, and received from the Columbia Compress Company a commercial warehouse receipt therefor.

Some time towards the end of arch, Robert H. Hassler, Inc., wrote to one J. N. Finley, who was engaged in the transfer business in the City of Columbia, asking him to store this car of shock absorbers for it. Thereupon J. N. Finley went with this letter of instruction and found that the Railroad Company had already stored the carload with the Columbia Compress Company. So, without varying the place of storage or the storage at all, he wrote back to Robert H. Hassler, Inc., the amount of the charges to date, and upon the receipt of a cheque to cover it, he paid the railroad charges and demurrage on the carload of shock absorbers and got, on the 24th of March, a new warehouse receipt from the Columbia Compress Company, the warehouseman, for the 220 boxes of shock absorbers; the receipt running in the name of Robert H. Hassler, Inc.

Thereafter the shock absorbers remained undisturbed in the warehouse of the Columbia Compress Company until the date of the attachment, that is to say, from the time of its delivery by the Railroad Company from its car on February 24, 1919, until May 5, 1919, it had remained in the possession of the Columbia Compress Company. Finley testified that he had mailed the commercial negotiable warehouse receipt given him on the 24th March, 1919, to Robert H. Hassler, Inc., who testified that it had never received it. This receipt has never been produced and is claimed by Robert H. Hassler, Inc., to have been lost.

[fol. 101] On April 21, Robert H. Hassler, Inc., approached the parties concerned in the Southern Accessories Company, in Richmond, Va., and desired to sell them this carload of shock absorbers in Columbia, S. C., and it was afterwards agreed that the parties concerned in the Company known as Southern Accessories Company, should form a new company to be known as the Hassler Sales Agency, Inc., who were to have the exclusive agency to sell the Hassler shock absorbers in the State of South Carolina, and were to take and pay for the carload of shock absorbers in Columbia, S. C.

In pursuance of this agreement, on April 24, 1919, a draft was drawn by Robert H. Hassler, Inc., on the Hassler Sales Agency, Inc., for the value of the shock absorbers as sold, for $9,622.55, to which draft was attached a written order on J. N. Finley, Columbia, S. C., to deliver the carload of shock absorbers to the Hassler Sales Agency, Inc.

The Hassler Sales Agency, Inc., had not yet been formed under that name, but on May 2, 1919, this draft was presented at the office of the Southern Accessories Company to the parties who had made the agreement with Robert H. Hassler, Inc., and was paid. The written order to J. N. Finley for the delivery of the carload of shock absorbers does not appear, according to the testimony, to have ever been presented to Finley or anyone else.

The Hassler Sales Agency, Inc., seems to have been subsequently incorporated on May 9, 1919, or rather, the Southern Accessories Company had its charter amended on May 9, 1919, by changing its name to that of Hassler Sales Agency, Inc.

The draft accompanying the written order to J. N. Finley to deliver was presented and paid on May 2, 1919. The attachment was levied in Columbia on May 5, 1919. No notice was ever given to the warehouseman, the Columbia Compress Company, of any transfer; and the question therefore is, under all these circumstances, does the sale to the Hassler Sales Agency, Inc., evidenced by the payment of the draft and the reception of the order to J. N. Finley to deliver the carload of shock absorbers, pass to it such a title as would give it priority in claim over the lien of the attachment levied three days afterwards, on May 5, 1919?

[fol. 102] As between the parties to a contract of sale the primary consideration is that of intention. If the contract was an executed final agreement, in which nothing remained to be done, the title passed, although there may not have been an actual delivery of the goods sold to the purchaser. In an executory agreement, where

something remains to be done before the final conclusion between the parties, the goods remtain the property of the seller until the contract is executed. As between the parties to the contract, the vendor and the purchaser, where the intention is manifested clearly and unequivocally, it controls, independent of whether the possession of the article has changed or not. Where third parties are concerned, mere intention is not sufficient. As between one of the parties to the contract and the creditors or bona fide purchasers of the other, the rule of law has always required more. It has required some evidence that can presum-tively be carried to the mind of a creditor or bona fide purchaser of the intention to transfer title, such as delivery, register, etc. The mere intention is not sufficient as between a party to the contract and the creditors or bona fide purchasers of the other.

The rule originally was that as to the effect on outsiders, there must be an actual delivery, or such actual delivery as was consistent with the nature and situation of the things sold; as delivery of the key of the warehouse, where goods are stored in it, or the transfer and delivery of a part of a large and bulky mass, with intent thereby to deliver the whole. With the development, however, of trade in personal property there arose the method of delivery by what was called a symbolical delivery, so as that goods in course of transportation could be delivered by a transfer and assignment of the bill of lading; so delivery in the case of a vessel at sea could be effected by its transfer by a bill of sale, and with the development of this method of transfer in a commercial way of articles, arose the general delivery by the transfer of what are known as quasi-negotiable instruments; such as bills of lading and warehouse receipts; the proper endorsement and delivery of which to the purchaser operated as a delivery of the articles thereby represented.

This did not dispense with the necessity of delivery of personal [fol. 103] property to complete its transfer so as to affect bona fide creditors or purchasers from the vendors without notice; but only substituted in such cases delivery by means of the assignment of the quasi-negotiable instrument, and the delivery was required to be of that which symbolically represented the articles themselves; for the mere endorsement and delivery of the bill of lading or the warehouse receipt without delivery of the instrument itself did not operate to effect a good delivery.

There is no doubt in the present case that there was no delivery by a transfer of the warehouse receipt; for that has been lost. There was no delivery by an order to deliver accompanied with notice to the warehouseman, which under the principles of equitable assignments as laid down in the case of Christmas vs. Russell, 14 Wall. 69, and the long list of cases following it, fully setting out the requirements, would not have been a good, equitable assignment in this case as against third parties.

In the case of a conflict between the rights acquired by a levy under an attachment or an execution, and a prior contract of sale, the question has frequently arisen, and it is held that where a sale of personal property is not completed by delivery either actual or constructive

as allowed by law, then the attachment after the date of the contract of sale but before the delivery, will give a valid lien to the attaching creditor, who is presumed in such case to stand in the position of a bona fide purchaser.

The principles governing such conclusions are fully set out in the case of Cummings vs. Gilman, 90 Maine 524 (38 Atlantic 538), and again in Keller vs. Paine, 107 N. Y. 83 (13 Northeastern, 635). See also the authorities cited in 35 "Cyc.," 311-312, and 320.

In the present case there was certainly no actual delivery of the goods, prior to the levy of the attachment. The goods were stored in the warehouse of the Columbia Compress Company, in the name of Robert H. Hassler, Inc. The negotiable instrument which under the Statute of South Carolina represented these goods and which could be transferred by endorsement and without the production of which the warehouseman could not deliver the goods, was never trans- [fol. 104] ferred to any one by Robert H. Hassler, Inc., nor any demand made on the warehouseman by any holder of this receipt.

The only evidence of the delivery of the goods is an order to J. N. Finley, who was not the warehouseman, and never had actual possession of the goods; not even an order from Robert H. Hassler, Inc., to the Columbia Compress Company was ever made or produced. No notice of any transfer was ever given to the warehouseman.

Under all the circumstances, it appears to the Court that as against bona fide creditors of or purchasers from Robert H. Hassler, Inc., there was no delivery of these articles in the warehouse which would take precedence over the levy of an attachment levied by a bona fide creditor of Robert H. Hassler, Inc.

The general weight of the decisions seems to be that an attaching creditor without notice, stands in the position of a bona fide purchaser without notice.

It is Therefore,

Adjudged, that the attachment in this case of the carload of shock absorbers in the warehouse of the Columbia Compress Company is a valid existing prior lien to the claim of the claimant, the Hassler Sales Agency, Inc.

It is

Further adjudged, That the plaintiff in this case, David C. Shaw, is entitled to enforce the payment of the judgment upon the verdict recovered by him to the extent of that judgment out of the articles so attached; and that after the payment therefrom of all the legal costs and expense of these proceedings applicable thereto, and of the amount due to the plaintiff of the amount of the judgment, upon the verdict recovered herein, that the surplus, if any, may be paid to the claimant, the Hassler Sales Agency, Inc.

Henry A. M. Smith, U. S. District Judge.

Charleston, S. C., December 29, 1922.

[fol. 105] A writ of error was taken to the Circuit Court of Appeals, by the Hassler Sales Agency, where said judgment was reversed and the matter remanded for a new trial to the District Court by decision filed 5 February, 1924.

Upon the second trial of the main case the Hassler Sales Agency was not represented, nor was its counsel present, nor did it participate in the trial. Upon the trial of the issue as to the ownership of the attached property the defendant Robt. H. Hassler, Inc., was not present, nor was it represented by counsel, nor did it participate in the trial. The said defendant, Robt. H. Hassler, Inc., was not made party to the Writ of Error whereby the said issue was taken to the Circuit Court of Appeals, nor was it served with the Citation in said proceedings, nor did it appear in the proceedings in connection therewith. Verdict rendered November 10, 1921. Ending of Term, December 5, 1921.

L. D. Jennings, A. S. Harby, Attorneys for Plaintiff.

On May 5, 1924, upon trial by jury, title to the attached property was found to be in the Hassler Sales Agency, and the judgment of the court duly entered to that effect.

Settled 27 June, 1924.

Henry A. M. Smith, U. S. District Judge. (L. S.)

[fol. 106] SUPPLEMENTAL BILL OF EXCEPTIONS—Filed June 27, 1924

Bill of Exceptions in the Application for Writ of Error to the United States Circuit Court of Appeals for the Fourth Circuit as to Proceedings Before the Honorable Ernest F. Cochran, District Judge.

After notice to plaintiff's counsel, a motion was made in this case before the Hon. Ernest F. Cochran, to set aside the verdict of $15,000.00 rendered on the second trial of the case by the jury against R. H. Hassler, Inc.

At this time judgment had not been entered on said verdict.

NOTICE OF MOTION FOR LEAVE TO ENTER UP JUDGMENT—Filed May 20, 1924

To Messrs. Rutledge, Hyde, Mann & Figg, attorneys for the defendant, Robert H. Hassler, Inc.:

You will please take notice that the undersigned attorneys for the plaintiff will move before his Honor, Ernest F. Cochran, Judge of the District Court of the United States, for the Eastern District of South Carolina, on the 26th day of May ,1924, one fifteen o'clock p. m., or as soon thereafter as Counsel may be heard, for an order giving plaintiff leave to enter judgment herein against the defendant Robert H. Hassler, Inc., for the sum of Fifteen Thousand Dollars, nunc pro tunc, as of March 27, 1923. Said motion to be made upon the record in this cause and the affidavit hereto attached.

L. D. Jennings, A. S. Harby, Attorneys for Plaintiff.

[fol. 107] AFFIDAVIT A. S. HARBY

STATE OF SOUTH CAROLINA,
Sumter County:

Personally appeared before me A. S. Harby, who, being duly sworn says:

I am one of the attorneys for the plaintiff in this case. According to my best recollection, sometime in the fall of the year 1922, when I happened to be in Charleston on other business, I went to the Clerk's office for the purpose of procuring a blank form of judgment to take home and have filled out in this case. I saw Mr. Murphy, the Deputy Clerk. Mr. Murphy informed me that there would be no necessity for me to take the blank home and have it filled out, as I could sign it in blank and leave it with him and as soon as the costs were taxed he would fill it out and enter it. Accordingly Mr. Murphy gave me a form of judgment which was not filled out, and I signed it with my name and Mr. Jennings's name as attorneys for the plaintiff, and left it with Mr. Murphy, and promised to furnish him with a statement of costs.

There was some delay about getting up the statement of costs, as it was necessary to have Mr. Jennings's bookkeeper make up a statement from his books and it was some time in February of 1923 before the statement was finally sent to the Clerk. I heard nothing more about the matter and assumed that judgment had been duly entered in this case, until the 12th day of May, 1924, when I appeared in Charleston in connection with the motion made by defendant to set aside the verdict herein, and then for the first time learned that judgment had not been entered, for the reason that Mr. Murphy had forwarded the judgment to Mr. Jennings and that Mr. Jennings had failed to return it.

While in Charleston I examined the docket containing entries of papers in this case, and under date of March 27, 1923, I ascertained that the Clerk had entered on the docket a taxation of costs, a charge for furnishing copies thereof to the attorneys for all parties, and in addition thereto a charge for filing the judgment and entering it, and the Clerk's docket fee.

[fol. 108] On my return to Sumter, as early as practicable, I went to Mr. Jennings's office and searched his files and found a letter from the Clerk to him dated March 27, 1923, which is hereto attached as Exhibit 1. I also found in Mr. Jennings's files the original judgment which had previously been signed by me, as heretofore stated, which will be exhibited to the Court upon the hearing of the motion to which this affidavit is attached. I also found in Mr. Jennings's office the taxation of costs in this case, copies of which it appeared by the entries on the Clerk's docket were furnished all parties hereto. The first item of said taxation being Judgment, Fifteen Thousand Dollars, and which taxation will be exhibited to the Court.

A. S. Harby.

Sworn to before me this 19 day of May, 1924. Mamie E. Gunter, Notary Public for S. C. (L. S.)

AFFIDAVIT L. D. JENNINGS

STATE OF SOUTH CAROLINA,
Sumter County:

Personally appeared before me L. D. Jennings, who, being duly sworn, says:

That he is one of the attorneys for plaintiff in this case; that he was very much surprised when he was informed that the original judgment in this case was in his office correspondence file in connection with a letter from the Clerk of this Court dated March 27, 1923. That to the best of deponent's recollection he has never seen this letter before and had no knowledge whatsoever that the judgment was in his possession. That in March, 1923, deponent had in his employ a young lawyer whose duty it would have been to have examined this judgment and return it to Mr. Hutson in accordance with the request contained in the letter, and in the natural course of handling deponent's business the said letter and judgment should [fol. 109] have been handled by this said lawyer, and deponent is absolutely unable to account in any way for the fact that the judgment was not promptly returned so that it would be entered. Deponent further avers that the defendant Robert H. Hassler, Inc., could in no way have been prejudiced by the failure to enter judgment. It appears from the taxation of costs that the said defendant, through its attorneys, was given notice on or about March 27, 1923, that a judgment of Fifteen Thousand Dollars, with interest from November 10, 1921, was being entered. It appears further from the record herein, that no bill of exceptions had been prepared or signed and no effect whatsoever made to sue out a writ of error. Deponent further says that until he learned on May 12th, 1924, that judgment had not been entered, deponent was under the impression and belief that judgment had duly been entered, and that it was a surprise to him to find that such was not the case.

L. D. Jennings.

Sworn to before me this 19 day of May, 1924. Mamie E. Gunter, Notary Public for S. C. (L. S.)

EXHIBIT 1 TO AFFIDAVIT OF A. S. HARBY

Charleston, S. C., March 27, 1923.

Messrs Jennings & Harby, Attorneys at Law, Sumter, S. C.

DEAR SIRS: I have taxed the costs in the case of Shaw vs. Hassler, and am enclosing you copy herewith, and am enclosing the Judgment for your inspection. If no exceptions are filed to the taxation within five days I will then enter up the judgment, putting in the amount of the costs. I am mailing by this mail a copy of the taxa-

tion of costs of Messrs. Rutledge, Hyde & Mann and to Messrs. Mitchell & Smith.

[fol. 110] Please return the judgment to me as soon as convenient.

Yours very truly, (Signed) Richard W. Hutson, Clerk.

This motion was refused by Judge Cochran.

ORDER REFUSING MOTION TO SET ASIDE VERDICT—Filed 16th day of May, 1924

On May 8, 1924, the attorneys for the defendant, Robert H. Hassler, Inc., served upon the attorneys for the plaintiff David C. Shaw, notice of a motion to set aside the verdict in the above entitled case and to dismiss the complaint with costs to the defendant, and this motion was heard on May 12, 1924.

The record is a voluminous one and it is not necessary or advisable that all of the various proceedings be recited. I shall, however, recite only such proceedings as are necessary to be recited in order that the basis and effect of my decision herein may be understood and in reciting the proceedings I am not passing upon their legal effect or sufficiency, as the record will speak for itself.

The suit was originally brought in the State Court. Certain objections to the jurisdiction were made in the State Court and an order passed in that Court and thereafter the cause was removed to this Court. Thereafter the Hassler Sales Agency, Inc., intervened setting up claim to the property attached. On November 10, 1921, at the November term at Columbia, two issues between the plaintiff and Robert H. Hassler, Inc., were submitted to a jury, and the jury on that date found that there was a breach of the contract and fixed the amount of the damages at $15,000, and it is this verdict which the defendant now moves to set aside. The record does not disclose that this verdict was ever set aside or any new trial granted upon these issues, nor has any final judgment been entered thereon nor has Robert H. Hassler, Inc., ever sued out any writ of error to correct any alleged errors in the said verdict.

Thereafter at the November, 1922, term the issue between the [fol. 111] plaintiff and the Hassler Sales Agency, Inc., as to the ownership of the property attached came on to be heard. The Court first submitted the issues to the jury, then, there being no evidence of fraud and collusion, withdrew the case from the jury and on December 29, 1922, filed a decree adjudging the property to be the property of Robert H. Hassler, Inc., that the attachment was a valid lien thereon and that the plaintiff, David C. Shaw, was entitled to enforce payment of the judgment upon the verdict recovered by him to the extent of that judgment out of the articles so attached, and from this judgment of December 29, 1922, the Hassler Sales Agency, Inc., sued out a writ of error from the Circuit Court of Appeals against the plaintiff, David C. Shaw, and the Circuit Court of Appeals reversed the same and remanded the case for a new trial. A new trial

was had on the issue between Hassler Sales Agency and the plaintiff David C. Shaw on May 5, 1924, which resulted in a verdict by the jury, finding that the Hassler Sales Agency, Inc., was the owner of the attached property and judgment was rendered thereon on May 5, 1924, adjudging that the Hassler Sales Agency, Inc., is entitled to the said property as against the attaching creditor.

At the hearing of the present motion the defendant, Robert H. Hassler, Inc., claims that the jurisdiction of the Court depends upon the attachment of the property and that the property having been decided by the Circuit Court of Appeals and the judgment of this Court in accordance with said decision, to be the property of the Hassler Sales Agency, Inc., therefore the verdict against Robert H. Hassler, Inc., should be set aside and the complaint dismissed for want of jurisdiction.

The plaintiff, David C. Shaw, claims that the defendant, Robert H. Hassler, Inc., waived the question of jurisdiction, that the term of Court at which the verdict was rendered has passed and there having been no new trial granted or writ of error sued out, this Court now has no jurisdiction to set the verdict aside.

It is not necessary to pass upon the various contentions made by the parties in reference to the legal effect of the various proceedings. My view is that the term of the Court at which the verdict in question was rendered having expired, this Court now has no power to set aside the said verdict, and the remedy of the parties, if any at [fol. 112] all, is by writ of error from the Circuit Court of Appeals.

Harley vs. U. S., 269 Fed. 384.
U. S. vs. Mayer, 235 U. S. 55.
Abbott vs. Brown, 241 U. S. 606.
In re Metropolitan Trust Co., 218 U. S. 312.

It is true that in the cases cited the Courts in stating the general principle say that Courts cannot set aside or alter final judgments after the expiration of the term at which it was entered unless the proceeding for that purpose was begun during the term and in this case the final judgment has not been actually entered, but I do not think that that should alter my decision, for while it is true that no formal entry of judgment has been made upon the verdict sought to be set aside, nevertheless upon a verdict of a jury in a law case the judgment of the Court goes as a matter of course and must be deemed to have been rendered or recovered in point of law at the term at which the verdict was rendered, although the formal entry threof may be postponed to a later date.

I think therefore that in this case so far as my jurisdiction over the verdict is concerned, the mere fact that no formal entry of the judgment was made would not affect the question, and that I have no power at this time to set aside the verdict.

As to the various questions raised by the parties herein as to the validity of the verdict and any judgment which may be entered thereon I express no opinion as I deem those questions are for the Circuit Court of Appeals.

In reference to the right of either party at the present time to enter up the judgment, Rule 57 of this Court provides that the entry of judgment, whenever such entry be authorized, may be made by the Clerk, upon the application of any party to the suit, whether for the purpose of enforcement or for the taking of a writ of error to or an appeal therefrom. Rule 48 provides that the entry of a judgment for the payment of money shall not be complete until the same has been duly filed in the judgment roll and entered by the Clerk in the judgment book, and Rule 47 provides that if the [fol. 113] judgment be not entered up within a year from the time at which it could be entered, it shall not be entered save upon leave of the Court or a Judge thereof.

The present motion asks simply that the verdict be set aside and the complaint dismissed so that the question of the right to enter up judgment is not now before me. This order is without prejudice to the right of either party to make any motion before me they may deem advisable for leave to enter up judgment upon the said verdict. The question as to the right of either party now to sue out a writ of error from the Circuit Court of Appeals in the present state of the record, or the right of either party if the judgment shall hereafter be entered to sue out a writ of error, is not before me, and I express no opinion upon the point, as I deem that is a question for the Circuit Court of Appeals, and this order is made without prejudice to the rights of the parties in that respect.

For the foregoing reasons and reserving the rights of the parties as above stated,

It is

Ordered, That the motion to set aside the verdict and dismiss the complaint be and the same is hereby refused.

Ernest F. Cochran, U. S. District Judge.

Charleston, S. C., May 16, 1924.

And thereupon a motion, after notice, was made before Judge Cochran by plaintiff's attorneys for leave to enter up the said judgment, which motion was granted by Judge Cochran, who filed the following Opinion and Order:

ORDER ALLOWING ENTRY OF JUDGMENT—Filed May 29, 1924

The plaintiff has made a motion to be allowed to enter up judg- [fol. 114] ment upon the verdict heretofore rendered against the defendant, R. H. Hassler, Inc. Rule 47 of this Court is as follows:

"All judgments shall take effect as to lien, rank and priority from date of entry. If a judgment be not entered up within a year from the time at which it could be entered, it shall not be entered save upon leave of the court or a judge thereof."

The verdict was rendered on November 10, 1921, at Columbia, and under Rule 46 of this Court judgment could have been entered within five days after the discharge of the juries for the November term, 1921. The regular term began according to law at Charleston on the first Tuesday in December, 1921. It appears therefore that the judgment could have been entered certainly early in December, 1921. The plaintiff apparently took no steps to enter the judgment until one year from the time when it could have been entered. From the affidavits accompanying the notice of motion it appears that the plaintiff undertook to enter judgment some time in March, 1923, but upon the judgment as proposed by plaintiff's attorney being returned to the plaintiff's attorney by the Clerk of this Court for inspection, the plaintiff's attorney, through negligence of a lawyer in his office, failed to return the judgment or take any further steps to have it entered. The plaintiff now seeks to have the judgment entered nunc pro tunc as of March 27, 1923. The attorneys for the defendant R. H. Hassler, Inc., resist this motion on the ground that there is no valid verdict and that therefore the Court should not authorize the entry of judgment. This question was fully considered by the Court on the plaintiff's motion to set aside the verdict and my conclusions thereon were set forth in the order of May 16, 1924, refusing the motion to set aside the verdict. In addition to the authorities therein cited, the most recent case upon the power of a Court to set aside a verdict after the term has expired is Greyer-Biehl vs. Hughes Electric Co. (C. C. A., 8th Circuit), 294 Fed. 802.

I find here upon the record of this Court a verdict and I do not think I have the power under the cases referred to, to review the action [fol. 115] of my predecessor, Hon. Henry A. M. Smith, and set that verdict aside after the expiration of the term at which it was rendered.

The sole question therefore before me upon the present motion is whether I should exercise my discretion under Rule 47 of this Court and allow the judgment to be entered at the present time. In view of the circumstances of the delay in entering the judgment, I have come to the conclusion that the plaintiff ought now to be allowed to enter up judgment, but I do not think that I should allow it to be entered nunc pro tunc as of March 27, 1923.

I do not think that I should deprive the defendant, R. H. Hassler, Inc., of any right to a writ of error it may have by ordering the judgment entered nunc pro tunc. When entered, the judgment must speak and operate as of the date of actual entry.

It is therefore

Ordered, That the plaintiff be allowed to enter up judgment within ten (10) days from the date of this order on the verdict heretofore rendered in the above entitled cause on November 10, 1921, such entry to take effect from and after the date of entry and not nunc pro tunc.

Ernest F. Cochran, U. S. District Judge.

Charleston, S. C., May 29, 1924.

[Title omitted]

JUDGMENT—Filed May 29, 1924

[fol. 116] This action having been brought to a trial at a District Court held on the tenth day of November, A. D. 1921, and a verdict for the Plaintiff having been rendered therein by the Jury for the sum of Fifteen thousand ($15,000.00) Dollars, and the costs of having been adjudged at Two hundred and seventy-eight 47/100 Dollars.

Now, on motion of Jennings & Harby, Attorneys for said Plaintiff;

It is adjudged that Plaintiff, David C. Shaw, recover of said Defendant, Robert H. Hassler, Incorporated, Fifteen thousand ($15,000.00) Dollars with interest from date of verdict, November 10, 1921, at seven per cent (7%) per annum so found with Two hundred and seventy-eight and 47/100 Dollars costs.

L. D. Jennings, A. S. Harby, Attorneys for Plaintiff. Richard W. Hutson, C. D. C. U. S. E. D. S. C.

May 29, 1924.

Said judgment having been entered under the said Order, defendant's attorneys, after due notice, moved to vacate the said judgment upon the ground that the Court had no jurisdiction to try the said case in which said judgment was rendered, or to enter the said judgment, which motion was refused by Judge Cochran, who filed the following Opinion and Order:

ORDER REFUSING MOTION TO VACATE JUDGMENT—Filed June 13, 1924

The defendant has given notice of a motion before me for an order vacating the judgment entered in this case, upon the ground that this Court had no jurisdiction to try the case or to enter judgment in personam in the case against the defendants.

[fol. 117] My conclusions in this matter are set forth in my order refusing to set aside the verdict and subsequent order allowing the plaintiff to enter up judgment, and any extensive further statement is unnecessary. However, I desire to say that as I view it the question of jurisdiction was one of the person and not of the subject matter and could be waived, and my predecessor, Hon. Henry A. M. Smith, U. S. District Judge, did assume jurisdiction and proceeded to the trial of the cause and the rendition of a verdict by a jury. He, therefore, took jurisdiction. The remedy of the parties, as I view it, if he committed error, is by a writ of error from the Circuit Court of Appeals. For these reasons and for the reasons set forth in my previous orders in this matter,

It is

Ordered, That the motion to vacate the said judgment be and the same is hereby refused.

Ernest F. Cochran, U. S. District Judge.

Charleston, S. C., June 13, 1924.

ORDER SETTLING BILL OF EXCEPTIONS

Amendment attached allowed as part of Bill of Exceptions.

Let the Clerk of this Court certify to the Circuit Court of Appeals as a part of the record, the following rules of this Court, to-wit: Rules forty-four (44), forty-seven (47), forty-eight (48), fifty-seven (57).

The foregoing Bill of Exceptions and amendment allowed and settled this June 27th, 1924.

Ernest F. Cochran, U. S. District Judge. (L. S.)

[fol. 118] IN UNITED STATES DISTRICT COURT

RULES OF COURT 44, 47, 48 AND 57, CERTIFIED AS PART OF RECORD

Rule 44. Whenever upon exceptions duly taken a bill of exceptions be desired by any party to be settled for the purpose of a writ of error to be applied for, the same shall be prepared by the party intending to apply for the writ and be served on the opposite party or his attorney within thirty (30) days after the rendition of the verdict, where the cause has been tried before a jury or within thirty (30) days after notice of the filing of the judgment of the court, if it has been tried by the judge without a jury (unless in either case further time be allowed by the court or a judge thereof) and thereupon the party served with such proposed bill of exceptions shall within ten (10) days after the service thereof (unless further time be allowed by the court or a judge thereof), propose and serve any amendments or alterations, and thereupon the bill of exceptions may by either party, upon written notice of not less than four (4) days of the time and place, be submitted to the presiding judge for settlement. If no amendments or alterations be proposed, the bill of exceptions may be submitted to the presiding judge for settlement without further notice, but no bill of exceptions will be settled or allowed, if not presented for settlement within sixty (60) days after the rendition of the verdict in the cause if tried before a jury or after the filing of the judgment of the court if tried without a jury, unless the time be enlarged by the court or a judge thereof.

No bill of exceptions will be allowed which does not comply with the requirements of the Rules of Practice at the time being of the United States Circuit Court of Appeals for the Fourth Circuit or of the United States Supreme Court as the case may be from which the writ of error is to issue.

Rule 47. All judgments shall take effect as to lien, rank and priority from the date of entry. If a judgment be not entered up within a year from the time at which it could be entered, it shall not be entered save upon leave of the court or a judge thereof.

[fol. 119] Rule 48. The entry of a judgment for the payment of money shall not be complete until the same has been duly filed in

the judgment roll and entered by the clerk in the judgment book required in Rule 49 of these Rules.

The entry of a judgment for the recovery of real or personal property or for anything other than the payment of money shall not be complete until the same has been duly filed in the judgment roll, entered on the law file book referred to in Rule No. 56 of these Rules, and copied in the journal referred to in Rule No. 241 of these Rules.

Rule 57. The entry of judgment, whenever such entry be authorized, may be made by the clerk, upon the application of any party to the suit, whether for the purpose of its enforcement or for the taking of a writ of error to or an appeal therefrom.

I, Richard W. Hutson, Clerk District Court of the United States, Eastern District of South Carolina, hereby certify that the foregoing Rules Nos. forty-four (44), forty-seven (47), forty-eight (48) and fifty-seven (57), are a true and correct copy of the Rules of this Court; certified up as a part of the Record by direction of the District Judge.

Given under my hand and seal of said Court at Charleston, S. C., this 30th day of July, 1924.

Richard W. Hutson, Clerk. (Seal.)

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed June 27, 1924

The defendant presents the following assignments of error:

First. That the District Judge, Hon. Henry A. M. Smith, erred in declining to determine and decide the question of jurisdiction of its person raised originally in the State Court, afterwards renewed [fol. 120] in the Answer of the defendant, and again upon the several trials of the cause, based upon the ground that the defendant, R. H. Hassler, Inc., was not the owner of the property attached in this proceeding, before the case upon the merits for recovery of damages was tried before a jury.

Second. That the District Judge, Hon. Henry A. M. Smith, erred in assuming jurisdiction of the defendant R. H. Hassler, Inc., and proceeding with the trial against him while the question of the jurisdiction of his person was undetermined, for that said jurisdiction depended upon the title to the property attached in the case, which title has since been held not to have been in said defendant but in the Hassler Sales Agency.

Third. Because the District Judge, Hon. Ernest F. Cochran, erred in refusing to set aside the verdict of $15,000 against the defendant, R. H. Hassler, Inc., before judgment was entered thereon, for that reason that it then appeared that the title to the property attached under which jurisdiction of said defendant was claimed, had then

been adjudged not to be in said defendant at the time of the levy of said attachment, and that therefore the District Court was without jurisdiction to try and determine the case.

Fourth. Because the District Judge, the Hon. Ernest F. Cochran, erred in allowing the plaintiff to enter up judgment upon the said verdict of $15,000, for that not sufficient showing was made warranting the entry of judgment at the time of the application therefor, and for and in that it then appeared from the records of the Court that the Court was without jurisdiction to make any order in the premises, the said Court not having jurisdiction to try and determine the case in the first instance.

Fifth. Because the District Judge, the Hon. Ernest F. Cochran, erred in refusing the defendants motion to vacate and set aside said judgment, for that the said District Court had not jurisdiction to try the case or enter the said judgment, it then appearing that the said District Court had no jurisdiction to try the said case in the first in-
[fol. 121] stance, the property attached upon which said jurisdiction was based having been found by the verdict of a jury and the judgment of the Court not to have been the property of the defendant, R. H. Hassler, Inc., when said action was begun and said attachment issued.

Rutledge & Hyde, Attys. for Defdt.

In United States District Court

Docket Entries

Petition for Writ of Error and Allowance of Writ, Filed June 27, 1924.
Writ of Error issued and Filed June 27, 1924.
Bond on Writ of Error, dated June 27, 1924.
Penalty $250.00 conditioned for costs.
Obligors: Robert H. Hassler, Inc., as principal, and American Surety Company of New York, as surety.
Citation filed June 30, 1924.
Service accepted June 30, 1924.

In United States District Court

Stipulation re Transcript of Record—Filed June 27, 1924

It is hereby stipulated and agreed that the Clerk of this Court shall make up a transcript of the record in the above styled cause, and transmit the same to the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Va.; and that it be

printed under the supervision of the Clerk of that Court, in accordance with Rule 23.

Rutledge & Hyde, Counsel for Plaintiff in Error. L. D. Jennings, A. S. Harby, Counsel for Defendant in Error.

[fol. 122] IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

I, Richard W. Hutson, Clerk of the District Court of the United States for the Eastern District of South Carolina, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of David C. Shaw, plaintiff, against Robert H. Hassler, Inc., et al., defendants, together with the judgment and all papers relating to the same, as settled by the bills of exceptions, and as appears by the original record now on file in my office.

Given under my hand and seal of said Court, at Charleston, S. C., in the district aforesaid, this 31st day of July, 1924.

Richard W. Hutson, C. D. C. U. S., E. Dist. S. C. (Seal.)

[fol. 123] IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 2297

R. H. HASSLER, INC., Plaintiff in Error,

versus

DAVID C. SHAW, Defendant in Error

Error to the District Court of the United States for the Eastern District of South Carolina, at Columbia

DOCKET ENTRIES

August 1, 1924, the transcript of record is filed and the cause docketed.

Same day, the original petition for writ of error, order allowing writ of error, writ of error, bond and citation are certified up under Sec. 7 of Rule 14.

Same day, the appearance of Benj. H. Rutledge, Simeon Hyde and Charles Martindale is entered for the plaintiff in error.

August 22, 1924, twenty-five copies of the printed record are filed.

September 8, 1924, the appearance of L. D. Jennings and A. S. Harby is entered for the defendant in error.

[fol. 124] IN UNITED STATES CIRCUIT COURT OF APPEALS,

[Title omitted]

Stipulation Re Transcript of Record—Filed Sept. 16, 1924

It is Stipulated and Agreed by Counsel in this case that the Transcript of Record herein, filed August 22, 1924, shall be corrected and amended by printing errata as follows:

First. On page 59 of said Transcript of Record, before the Order refusing to Remand, the grounds of the motion to remand should have been printed, as follows:

NOTICE OF MOTION TO REMAND

[Title omitted]

[fol. 125] To Messrs. Rutledge and Hyde, Attorneys for the defendant Robert H. Hassler, Incorporated, and to James Hammond, Esq., Attorney for the defendant Columbia Cotton Compress Company:

You will please take notice that the undersigned, Attorneys for the plaintiff herein, will present the attached Motion to Remand to his Honor, Judge H. A. M. Smith, at his Chambers in Charleston, S. C., on Friday, the 17th day of October, 1919, at one o'clock P. M., or as soon thereafter as Counsel can be heard.

L. D. Jennings, John L. Clifton, A. S. Harby, Plaintiff's Attorneys.

MOTION TO REMAND

[Title omitted]

And now comes the plaintiff and moves the Court to remand the above entitled cause to the State Court from whence it was removed for trial for the following reasons:

I. Because the defendant, Columbia Cotton Compress Company, is a corporation, duly organized and existing under and by virtue of the laws of the State of South Carolina, and doing business in said State at Columbia, and plaintiff is a resident and citizen of the State of South Carolina, and that there is involved in this suit no separable controversy which is wholly between citizens of another State on the one hand and citizens of the State of South Carolina on the other hand, all of which facts are apparent in the record in this cause.

II. Because it appears from the allegations of the Complaint herein that the defendant, Columbia Cotton Compress Company, [fol. 126] is a proper necessary party to the determination of the issues raised by said complaint, and is not a mere nominal party,

nor is it joined in this suit only on the allegation that it has in its custody certain goods which are averred to the property of the defendant, Robert H. Hassler, Incorporated.

III. Because this honorable Court is without the jurisdiction to hear and determine the issues raised in this suit for the reason that this suit is not between parties of the State of South Carolina on the one hand and citizens of a different State upon the other hand, nor does there exist in this suit a separable controversy wholly between citizens of the State of South Carolina on the one hand and citizens of another State on the other hand.

Wherefore, plaintiff says this Court has no jurisdiction to try and determine this case, and prays that the same may be remanded to the Court of Common Pleas for the County of Sumter, State of South Carolina, from whence it came.

L. D. Jennings, John H. Clifton, A. S. Harby, Plaintiff's Attorneys.

Sworn to by A. S. Harby. Jurat omitted in printing.

[fol. 127] Second. On page 73 of said Transcript of Record, after the word "Court" (reads the issues framed), the following issues should have been printed:

[Title omitted]

Ex Parte Hassler Sales Agency, Inc.

Issues for Jury on Application of Hassler Sales Agency, Inc.

1. At the date of the alleged transfer from Robert H. Hassler, Inc., to the Hassler Sales Agency, Inc., of the carload of Hassler shock absorbers on storage in the City of Columbia, S. C., was the Robert H. Hassler, Inc., acting in good faith in the belief that its contract with D. C. Shaw had been terminated?

2. Was the transfer of said shock absorbers by Robert H. Hassler, Inc., colourable or fraudulent and collusive and intended to defeat the rights of the plaintiff, David C. Shaw?

3. Were the parties or any of them who afterwards became the officers of the Hassler Sales Agency, Inc., aware at the time of the colourable or fraudulent and collusive intent of Robert H. Hassler, Inc., and did they or any of them knowingly connive at, assist, or collude with the said Robert H. Hassler, Inc., in the execution of such intent?

A True Copy. Attest.

Richard W. Hutson, East. Dist. So. Ca. Rutledge & Hyde, Attys. for Plff. in Error. L. D. Jenninngs, A. S. Harby, Attys. for Defendant in Error. (Seal.)

[fol. 128] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

NOTICE OF MOTION TO STRIKE OUT BILL OF EXCEPTIONS—Filed October 23, 1924

To Messrs. Rutledge, Hyde, Mann & Figg, Attorneys for Plaintiff in Error:

You will please take notice that upon the call of the above entitled case for trial, Defendant in Error will present the motion hereto attached.

L. D. Jennings, A. S. Harby, Counsel for Defendant in Error.

[fol. 129] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

MOTION TO STRIKE BILL OF EXCEPTIONS

Now comes the defendant in error, D. C. Shaw, and moves the Court to strike from the transcript of record herein the Bill of Exceptions as to proceedings before the Honorable Henry A. M. Smith, District Judge (the same commencing on page 39 and terminating on page 105 of the said transcript), for the following reasons and upon the following grounds, to-wit:

1. Because the said District Judge was without jurisdiction on [fols. 130 & 131] June 27, 1924, when the said Bill of Exceptions was presented, settled and signed to settle and sign the same, for the reason that (a) the time provided by the rule of the Court for presenting a bill of exceptions had expired, (b) that the term at which the action was tried had ended, and (c) the defendant in error duly objected and excepted to the settlement and signing of said Bill of Exceptions.

2. The District Judge was without jurisdiction to enlarge and continue the time for presenting a Bill of Exceptions, for the reason that (a) the time provided by standing rule had expired, without an application for such enlargement having been made within said time, and (b) the term at which the cause was tried and judgment rendered had expired nearly three years prior to the attempted enlargement, without any reservation of jurisdiction over the cause.

The above motion will be made upon the record herein.

L. D. Jennings, A. S. Harby, Attorneys for Defendant in Error.

[fol. 132] IN UNITED STATES CIRCUIT COURT OF APPEALS

ARGUMENT OF CAUSE

November 11, 1924, cause came on to be heard before Woods, Waddill and Rose, Circuit Judges, and is argued by counsel and submitted.

[fol. 133] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

OPINION—Filed January 20, 1925

(Argued November 11, 1924. Decided January 20, 1925)

Before Woods, Waddill and Rose, Circuit Judges

Charles Martindale and Simeon Hyde (Rutledge, Hyde, Mann & Figg and Benjamin H. Rutledge on brief) for Plaintiff in Error and L. D. Jennings and A. S. Harby for Defendant in Error.

ROSE, Circuit Judge:

In what we have to say we will refer to the parties as they were [fol. 134] below. That is to say, we will call the plaintiff in error, Robert H. Hassler Inc., an Indiana corporation, the defendant and the defendant in error, David C. Shaw, a citizen of South Carolina, the plaintiff. The suit was originally brought in a State Court and was removed to the Federal. In the latter, the plaintiff secured a personal judgment against the defendant. The only questions raised by the assignments of errors are whether the State Court, in the first instance, and subsequently the District Court of the United States, acquired such jurisdiction over the defendant as would sustain a judgment in personam against it. The case as here presented is therefore one in which the jurisdiction of the District Court and that alone is in issue within the meaning of Section 238 of the Judicial Code. Remington vs Central Pacific Rwy. Co. 198 U. S. 95, Shepherd vs Adams 168 U. S. 618, Board of Trade vs Howard Elevator Co. 198 U. S. 424, and is therefore one over which we have no jurisdiction. The Carlo Poma, 255 U. S. 219. In obedience to Section 238 A of the Judicial Code, act of September 14, 1922, 42 Stat. at large 837, the writ will be

Transferred to the Supreme Court.

[fol. 135] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

JUDGMENT—Filed January 21, 1925

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of South Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that this cause, be, and the same is hereby, transferred to the Supreme Court of the United States pursuant to the Act of Congress of September 14, 1922, in accordance with the opinion of the Court filed herein, at the cost of the plaintiff in error.

John C. Rose, U. S. Circuit Judge.

[fol. 136] IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true transcript of the record and proceedings in the therein entitled cause as the same remains upon the records and files of the said Circuit Court of Appeals, and herewith transferred to the Supreme Court of the United States in accordance with the Act of Congress of September 14, 1922.

In testimony whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, this 7th day of February, A. D., 1925.

Claude M. Dean, Clerk U. S. Circuit Court of Appeals, Fourth Circuit. (Seal of United States Circuit Court of Appeals, Fourth Circuit.)

[fol. 137] IN UNITED STATES DISTRICT COURT

WRIT OF ERROR—Filed June 27, 1924

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judge of the District Court of the United States for the Eastern District of South Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before

you, or some of you, between David C. Shaw, Plaintiff and Robert H. Hassler, Inc., et al., Defendants, a manifest error hath happened, to the great damage of the said Robert H. Hassler, Inc., et al., as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Fourth Circuit, together with this writ, so that you have the same in the said Circuit Court of Appeals at Richmond, within forty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, this 27th day of June, in the year of our Lord one thousand nine hundred and twenty-four.

Richard W. Hutson, Clerk of the District Court of the United States for the Eastern District of South Carolina. (Seal of United States District Court, Eastern District So. Ca.)

Allowed by Henry A. M. Smith, U. S. District Judge.

[File endorsement omitted.]

[fol. 138] CITATION—In usual form, showing service on A. S. Harby, et al.; filed June 30, 1924; omitted in printing

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[fol. 139] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR AND ORDER ALLOWING WRIT OF ERROR—Filed June 27, 1924

To the Honorable Ernest F. Cochran, Judge of the District Court aforesaid:

Now comes R. H. Hassler, Inc., by its attorneys and respectfully shows that on the 10th day of Nov. a jury duly empanelled found a verdict of Fifteen Thousand Dollars against your petitioner and in favor of D. C. Shaw, and upon said verdict a final judgment for $15,278.48 was entered on the 29th day of May 1924 against your petitioner, defendant.

Your petitioner feeling himself aggrieved by the said verdict and judgment entered thereon as aforesaid, herein petitions the Court for an Order allowing him to prosecute a Writ of Error to the Circuit Court of Appeals of the United States for the Fourth Circuit under the laws of the United States in such cases made and provided.

Wherefore, premises considered, your petitioner prays that a Writ of Error do issue for an appeal in its behalf to the United States Circuit Court of Appeals aforesaid, sitting in the said circuit for the correction of the erro-s complained of and herewith assigned be allowed and that an Order be made fixing the amount of the security to be given by plaintiffs in error conditioned as the law directs.

Rutledge & Hyde, Def'd'ts' Attys.

Writ of error allowed 27" June, 1924. Henry A. M. Smith, U. S. Dist. Judge.

[File endorsement omitted.]

[fol. 140] Bond on Writ of Error for $250—Approved and filed June 30, 1924; omitted in printing

Endorsed on cover: File No. 30,870. E. South Carolina D. C. U. S. Term No. 278. R. H. Hassler, Inc., plaintiff in error, vs. David C. Shaw. Transferred from the United States Circuit Court of Appeals for the Fourth Circuit pursuant to the Act of September 14, 1922. Filed February 14th, 1925. File No. 30,870.

(6995)

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1925

No. 278

ROBERT H. HASSLER, INC., Plaintiff in Error,

vs.

DAVID C. SHAW, Defendant in Error

Error to the District Court of the United States for the Eastern District of South Carolina, Transferred from the United States Circuit Court of Appeals

STIPULATION AND ADDITION TO RECORD—Filed Oct. 12, 1925

For the purpose of obviating the delay and cost of certiorari for diminution of the record, it is now stipulated and agreed between the parties to the record:

That in place of the notice to dismiss and set aside the alleged service of summons printed on page 5 of the record, the said notice to dismiss and set aside the alleged service of summons shall read as follows:

"Please take notice that the undersigned appear specially herein on behalf of Robert H. Hassler, Inc., Defendant as their Attorneys, for the purpose and only for the purpose of moving to dismiss and set aside the alleged service of summons herein upon the said Robert H. Hassler, Inc., and shall move the Honorable John S. Wilson, Circuit Judge of the third Judicial Circuit, at his chambers in Manning, S. C., at noon or as soon thereafter as counsel can be heard on Friday, the 30th day of May, 1919, to set aside the service of the said summons herein, for want of jurisdiction, upon the ground that the said Robert H. Hassler, Inc., is a foreign corporation, and that it has no agent or officer or other person residing in this state, or within the jurisdiction of this State upon whom service can be made and that it did not own any property with the jurisdiction of the State after the 2nd day of May, 1919, and that the property seized under the attachment herein was not the property of Robert H. Hassler, Inc.; and that the said Robert H. Hassler, Inc., does not appear generally in this action, but expressly restricts its appearance to the purpose of moving to set aside service of summons for said want of jurisdiction.

"You will further take notice that this motion so made under said restricted appearance shall be made upon the affidavits of Edward W. Springer and Thomas B. Davis copies of which are herewith served upon you, and upon the record in the above stated case."

That the designation and running-head on page 6 of the record shall be changed to "In The United States District Court" and it is agreed that the answer set forth on pages 6, 7, 8, 9, 10, 11, 12 and

13 of the printed record was filed in the District Court of the United States for the District of South Carolina and was not filed in the Court of Common Pleas of Sumter County, no answer having been filed in the latter court.

That on page 40 of the printed record where the filing of the answer is referred to, near the bottom of the page, and reference is made to the answer as previously printed in the Record, the reference to "page 12" of the record should be changed to page 6 of the printed record.

That on page 9 of the printed record, following (Folio 14) should be inserted "Exhibit "A" to Answer heretofore printed in Record page 5."

On page 74 of the printed record strike out the sentence "This motion was refused by Judge Cochran" same having been printed in error.

On page 74 of the printed record, immediately before the Order refusing the motion to set aside verdict, should be printed the Notice and Grounds upon which said motion was made, which are as follows:

Notice of Motion to Set Aside Verdict

"To Messrs. L. D. Jennings and A. S. Harby, plaintiff's attorneys:

"Please take notice that on Monday next, May 12th inst., we shall apply to the Hon. Ernest F. Cochran, United States District Judge for the Eastern District of South Carolina, at the United States Court House at Charleston, S. C. at Ten o'clock a. m., or as soon thereafter as counsel can be heard, for granting of the Order in the above stated case, copy of which is here to attached."

Proposed Order

"It appearing to this Court that a certain proceeding in which the Hassler Sales Agency intervened in this case, asserting title to the property attached herein, which attachment was the basis of the jurisdiction of this Court was brought in this Court, and it further appearing that the property so attached has now been determined finally not to be the property of the said Defendant, but that of Hassler Sales Agency, Inc. and that this Court was therefore without jurisdiction to try this case, it is

"Ordered that the verdict in the above styled case is set aside, and the Complaint therein dismissed with costs for defendant."

Signed October 10, 1925.

Charles Martindale, Counsel for Robert H. Hassler, Inc., Plaintiff in Error. L. D. Jennings, A. S. Harby, Counsel for D. C. Shaw, Defendant in Error.

[File endorsement omitted.]

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No. 278

ROBERT H. HASSLER, INC.,
Plaintiff in Error,

v.

DAVID C. SHAW,
Defendant in Error.

In Error to the District Court of the United States for the Eastern District of South Carolina; Transferred from the United States Circuit Court of Appeals of the Fourth Circuit, January 21, 1925.

BRIEF FOR PLAINTIFF IN ERROR.

The opinions of the District Court of the United States for the Eastern District of South Carolina in overruling the motions to set aside the verdict; allow-

ing the entry of the judgment complained of; and overruling of motion to vacate the judgment, are found at pages 74, 75, 76, 77 and 78 of the record.

JUDGMENT BELOW.

The judgment to be reviewed is a judgment *in personam* for the sum of Fifteen Thousand Dollars with interest from November 10, 1921, at seven per cent per annum, and costs, rendered May 29, 1924. (R. 78.)

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

1. The judgment to be reviewed was rendered May 29, 1924, and is a judgment *in personam* for the sum of Fifteen Thousand Dollars with interest from November 10, 1921, at seven per cent per annum, and costs. (R. 78.)

2. The action is a suit for damages for breach of contract and was brought May 5, 1919, in the Court of Common Pleas of Sumter County, South Carolina, by David C. Shaw, a resident and citizen of the State of South Carolina, against Robert H. Hassler, Inc., a corporation incorporated under the laws of the State of Indiana, with its principal office in Indianapolis in said state.

It was alleged that the defendant had property in the possession of the Columbia Cotton Compress Company engaged in the storage business at Columbia, South Carolina. (R. 3.)

No process was ever served within the State of South Carolina upon plaintiff in error. A summons, complaint, attachment bond, and warrant of attachment were served May 5, 1919, on the Columbia Cotton Compress Company at Columbia, South Carolina. (R. 4-5.) A summons was issued and served May 14, 1919, on plaintiff in error at its office in the City of Indianapolis, Indiana. (R. 4.)

On May 30, 1919, before the time for answering, plaintiff in error filed in the State Court a notice that it appeared specially upon behalf of Robert H. Hassler, Inc.: "For the purpose and only for the purpose of moving to dismiss and set aside the alleged service of summons herein upon the said Robert H. Hassler, Inc., and shall move the Hon. John S. Wilson, Circuit Judge of the Third Judicial Circuit, at his chambers in Manning, S. C., at noon or as soon thereafter as counsel can be heard, on Friday, the 30th day of May, 1919, to set aside the service of the said summons herein, for want of jurisdiction, upon the ground that the said Robert H. Hassler, Inc., is a foreign corporation, and that it has no agent or officer or other person residing in this state, or within the jurisdiction of this state upon whom service can be made, and that it did not own any property within the jurisdiction of the state after the 2nd day of May, 1919, and that the property seized under the attachment herein was not the property of Robert H. Hassler, Inc.; and that the said Robert H. Hassler, Inc., does not appear generally in this action, but expressly restricts its appearance to

the purpose of moving to set aside service of summons for want of jurisdiction." (R. 5 as corrected by stipulation correcting the printed record.)

There was then in force in South Carolina "An Act to Regulate the Procedure before Courts or Other Tribunals When Objection is made to the Jurisdiction," approved Feb. 21, 1919. Stat. at L. (Acts) S. C. 1919, No. 39, p. 55, as follows:

> "Section 1. *Objection to jurisdiction of Courts, or Tribunals, How Made.* When in any case or proceeding before any Court or other tribunal any party shall appear for the sole purpose of objecting to the jurisdiction of such Court or tribunal, and such Court or tribunal shall upon such objection being made overrule the same, such party may give notice, either to the Court or tribunal or the opposing party, that he intends to rely on such jurisdictional objection or reserve his rights thereunder. Upon the overruling of such objection to the jurisdiction and giving of such notice, such party may thereafter appear generally or answer or plead or contest upon the merits, and such general appearance, answer, pleading or contest upon the merits shall not be deemed a waiver of the objection to the jurisdiction.
>
> "Section 2. *Notice.* The notice required by Section 1 of this Act need not be in any special form or in the exact language of this Chapter, but any notice which informs the Court, Tribunal or opposing party in substance of the intention of the party to rely on the objection made, or reserving his rights thereunder, shall be deemed a sufficient notice. The notice may be oral, if given to the Court or tribunal in the presence of the opposing party or his attorney, in which case it shall be the duty of the Court

> or tribunal to make note of the same, so as to preserve the rights of the party, but in all other cases such notice shall be in writing. Notice to the attorney representing any party shall be deemed notice to the party."

The motion to set aside service of process and dismiss the action was duly made in the State Court supported by affidavits of Edward W. Springer and Thomas B. Davis (R. 27 to 36) and the Court on May 31, 1919, entered the following order:

> "This matter comes before me on motion to set aside the service on the defendant Robert H. Hassler, Inc., upon the grounds stated in the moving papers. Plaintiff opposed the motion, and offered certain counter-affidavits. After hearing arguments and giving the matter due consideration:
>
> It is ordered, that said motion be and the same hereby is refused, without prejudice, however, to the right of the defendant to set up such special defense in its answer as to the jurisdiction of the court as it may deem advisable." (R. 9, R. 37.)

On June 2, 1919, before the time for answering expired, plaintiff in error filed its petition and bond to remove the said cause into the District Court of the United States in and for the Eastern District of South Carolina and the transcript of the record was duly filed in the office of the Clerk of said court within the 30 days allowed by law. (R. 37.)

Motion to remand was overruled October 24, 1919. (R. 40.) Plaintiff in error filed its answer in the Dis-

trict Court (R. 6), the first paragraph of which answer averred that it had entered a special appearance in the cause for the purpose of making and made on the 30th day of May, 1919, a motion to set aside the service of summons upon the defendant, before Honorable John S. Wilson, Judge of the Third Circuit, and that the judge refused to grant the motion by an order wherein and whereby he expressly reserved the right to the defendant to set up such special defense in its answer as to the jurisdiction of the court as it may deem advisable; and it then set up want of jurisdiction of the person or property of the defendant. (R. 6.)

In its second defense it answered to the merits reserving its right to object to, and not waiving its right under the objections to the jurisdiction as alleged in the first defense. (R. 6.)

An order giving leave to the defendant to amend its complaint and plaintiff in error leave to amend its answer, was entered. (R. 14-15.)

Plaintiff in error filed its answer to the amended complaint setting up its special appearance and its objections to the want of jurisdiction of the person or property of plaintiff in error, and also pleading to the merits. (R. 19, 20, 21.)

Motion to strike out the defense of want of jurisdiction was overruled "without any prejudice whatsoever to the rights of either party on the hearing of the merits on all questions arising under the interposition of such defense." (R. 41-42.)

Hassler Sales Agency, a corporation under the laws of the State of Virginia, with its principal place of business in the City of Richmond, Virginia, intervened and filed a claim to the possession of the property attached upon the ground that it was the owner thereof at the time of the attachment. (R. 42.)

The first trial resulted in the failure of the jury to agree and a mistrial was ordered. (R. 64.)

At the second trial attorneys for plaintiff in error asked the court to first try the questions arising under the intervention, and counsel for intervenor, Hassler Sales Agency, Inc., insisted that the issues raised by the claimant on its claim to the property, should first be disposed of.

The Court overruled these requests and held that the court would first try the main case "for if no damages should be found against Robert H. Hassler, Inc., the trial of the issue as to the ownership of the property and the validity of the attachment would be unnecessary." (R. 64.)

The trial resulted in a verdict of Fifteen Thousand Dollars damages against plaintiff in error. (R. 64.)

Thereafter the issue as to the title to the property attached was tried, and the cause was withdrawn from the jury and the court rendered an opinion and decicision sustaining the attachment (R. 64-70), and thereupon rendered a judgment:

> "Adjudged that the attachment in this case of the carload of shock absorbers in the warehouse of the Columbia Compress Company is a

valid, existing prior lien to the claim of the claimant, Hassler Sales Agency, Inc., It is

Further Adjudged that the plaintiff in this case, David C. Shaw, is entitled to enforce the payment of the judgment upon the verdict recovered by him to the extent of that judgment out of the articles so attached; and that after the payment therefrom of all legal costs and expenses of these proceedings applicable thereto and of the amount due to the plaintiff of the amount of the judgment upon the verdict recovered herein, that the surplus, if any, may be paid to the claimant Hassler Sales Agency, Inc." (R. 70.)

Hassler Sales Agency, Inc., took a writ of error to the Circuit Court of Appeals of the Fourth Circuit. The decision of the court below was reversed, and it was held that the property attached was the property of Hassler Sales Agency, Inc., and ordered a new trial. (*Hassler Sales Agency, Inc., v. Shaw*, 295 Fed. 854.) On May 5, 1924, upon trial by jury title to the attached property was found to be in Hassler Sales Agency and judgment was duly entered in the court below to that effect. (R. 71.)

On May 8, 1924, plaintiff in error filed its motion to set aside the verdict and dismiss the complaint with costs to the defendant. The motion was based upon the claim that the only jurisdiction the court could have acquired, depended upon the attachment of the property which was adjudged to be not the property of the defendant and that it did not have jurisdiction of the person of the defendant. This motion was overruled. (R. 74-75.) Thereupon the judgment appealed

from was entered. (R. 78.) The opinion of the Court allowing the entry of such judgment, is found at R. 77.

Plaintiff in error then moved to vacate the judgment upon the ground that the court had no jurisdiction to try the case in which said judgment was rendered or to render the said judgment; which motion was overruled. (R. 78.)

On June 27, 1924, plaintiff filed its Assignment of Errors (R. 80), Petition for Writ of Errors (R. 88), and Bond which was approved by the court and an order was entered allowing a writ of error to the United States Circuit Court of Appeals for the Fourth Circuit. (R. 89.) Writ of error was filed June 27, 1924. (R. 87.) The Transcript of the Record was filed in the Circuit Court of Appeals August 1, 1924. (R. 82.)

The Circuit Court of Appeals for the Fourth Circuit January 20, 1925, held that

> "The case as here presented is therefore one in which the jurisdiction of the District Court and that alone is in issue within the meaning of Section 238 of the Judicial Code." (R. 86.)

That court ordered that the cause be transferred to the Supreme Court pursuant to the Act of Congress of September 14, 1922, (then in force but since repealed.) (R. 87.)

The jurisdiction of this court is invoked under Section 238 Judicial Code, Act. Jan. 28, 1915, c. 22, § 2, 38 Stat. 804 U. S. Comp. Stat. 1916, § 1215, p. 1704. Judicial Code, § 238 (a) Act September 14, 1922, c.

305, 42 Stat. 837. The following cases support jurisdiction of this court:

Davidson Bros. Marble Co. v. U. S. ex rel. Gibson, 213 U. S. 10;
Davis v. O'Hara, decided Nov. 24, 1924, 45 Sup. Ct. 104;
Remington v. Central Pacific Ry. Co., 198 U. S. 95, 97;
Chicago Board of Trade v. Hammond Elevator Co., 198 U. S. 424, 435;
The Carlo Poma, 255 U. S. 219;
The Pesaro, 255 U. S. 216;
Shepard v. Adams, 168 U. S. 618.

STATEMENT OF THE CASE.

This is an action for breach of contract commenced in the Court of Common Pleas of Sumter County, South Carolina, by a complaint filed May 3, 1919 (R. 1-4) and the issuance out of said court on May 3, 1919, of a summons which was served upon the plaintiff in error at Indianapolis, Indiana, by one Frank C. Brosius. (R. 4.)

It is averred in the complaint that plaintiff (defendant in error) is a resident and citizen of the County of Sumter, State of South Carolina; that the defendant (plaintiff in error) Robert H. Hassler, Inc., is a foreign corporation incorporated under the laws of the State of Indiana; that its principal place of business is in Indianapolis in said state (R. 1) and it so admitted in the amended complaint. (R. 15, par. 1.)

No other process of any kind was ever served upon the plaintiff in error and no process was served upon any officer or agent of plaintiff in error in the state and district of South Carolina.

It was averred in the complaint that Columbia Cotton Compress Company, made co-defendant, then had in its possession a carload of shock absorbers which were the property of the defendant Robert H. Hassler, Inc., plaintiff in error. (R. 3.)

A summons, and complaint, attachment bond, and warrant of attachment were served on the defendant Columbia Cotton Compress Company, at Columbia, South Carolina. (R. 4, 5.)

Plaintiff in error filed a special and qualified appearance in the Court of Common Pleas, "for the purpose and only for the purpose of moving to dismiss and set aside the alleged service of the summons" upon the plaintiff in error, and specially restricted its appearance to the purpose of moving to set aside the service of summons for want of jurisdiction. (R. 5 as corrected by stipulation.)

A motion by plaintiff in error to set aside the service upon the plaintiff in error was submitted, supported by the affidavits of Edward W. Springer (R. 27 to 30); Thomas B. Davis (R. 31 to 33); an exhibit (R. 32, 33); and opposed by affidavits of the defendant in error, David C. Shaw (R. 33, 34); A. S. Harby (R. 34, 35); W. H. Jeffords (R. 35, 36).

Motion to set aside the service of process on plaintiff in error was heard by the Court of Common Pleas, and it was ordered:

> "That said motion be, and the same hereby is refused without prejudice, however, to the right of the defendant to set up such special defense in its answer as to the jurisdiction of the court as it may deem advisable." (R. 37.)

Plaintiff in error thereupon seasonably filed its petition and bond for the removal of the cause to the District Court of the United States in and for the Eastern District of South Carolina. (R. 37, 38, 39.)

A motion to remand the cause was made and denied. (R. 39.) The plaintiff in error then filed its answer and therein reserved its special appearance and rights thereunder. (R. 6, 7, 8, 9.)

Plaintiff in error on February 21, 1921, filed a motion to amend its answer by inserting a paragraph pleading the Statute of Frauds. (R. 14.) Thereupon it was ordered that plaintiff below have leave to file an Amended Complaint and the defendant below have leave to file Amended Answer to such Amended Complaint. (R. 14, 15.) Thereupon defendant in error filed an Amended Complaint. (R. 15, 19.) Plaintiff in error filed an answer to the Amended Complaint in which it reserved and relied upon its special appearance only, and its objection to the jurisdiction of the Court, and under such reservation answered to the merits. (R. 19, 20, 21, 22, 23.)

Defendant in error filed motion to strike out the first defense contained in the answer of the plaintiff in error. (R. 41.) The Court entered an order refusing said motion. The order on said motion is as follows (R. 41, 42):

"This matter came on to be heard upon a motion to strike out the first defense contained in the answer of the defendant, Robert H. Hassler, Inc., and counsel on both sides appeared and have been heard.

On consideration of the same and it appearing that the motion at this time depends on whether or not the Court shall hold that the defendant, Robert H. Hassler, Inc., had heretofore by its actions and pleadings herein waived any right to contest the jurisdiction of this Court upon the grounds set up in the first defense and it further appearing to the Court that under the order heretofore made in the State Court by the presiding Judge thereof, that leave was reserved to the defendant to set up the question of jurisdiction heretofore made by him in the State Court in his answer, and it being a question therefore under all the circumstances and pleadings, whether or not there has been any such waiver; in the opinion of the court, it would be better that that question be decided together with all the other questions in the cause at the trial of this cause on the merits. It is therefore

Ordered, That the motion to strike out be and the same is hereby refused, but without any prejudice whatsoever to the rights of either party on the hearing of the merits on all questions arising upon the interposition of such defense."

At this stage of the case Hassler Sales Agency of Richmond, Virginia, filed an intervention and claim of title to the attached property. (R. 42, 43.) An order was thereupon entered by the Court to be served on defendant in error, plaintiff in error, and the Columbia Cotton Compress Company, to show cause why the said

property should not be delivered to said claimant. (R. 43, 44.)

Defendant in error made return to said Order (R. 44, 45, 46). Upon this return the Court ordered that the issue be tried before this court and a jury as to "whether or not the Hassler Sales Agency is the sole owner of the property attached herein, or whether defendant Robert H. Hassler, Inc., has any attachable interest therein, and if so, what interest; and the said issue shall be tried at the same time as the trial of the issues in the original action herein, unless hereafter otherwise ordered by this Court." (R. 47, 2nd par.)

It was also ordered that upon the giving of a bond by the claimant in the sum of Fifteen Thousand Dollars the property be delivered to it. (R. 47.)

> "The case with the claim last above referred to came on to be heard before the Honorable Henry A. M. Smith (Judge of the United States District Court for the Eastern District of South Carolina), and a jury, at Columbia, South Carolina, at the January Term, 1921, whereupon the defendant's attorneys moved the Court to determine the question of jurisdiction raised by the pleadings in the State Court referred to, and in the first paragraph of defendant's answer, in this court, and the attorney for the Hassler Sales Agency of Richmond, Va., also claimed that the claimant represented by him had a right to have the question of the attached property first considered and determined."

The District Judge held that both the claim of the intervenor and the main action should be tried together and the testimony heard before framing the issues.

Whereupon an exception was noted by the attorneys both for the defendant and for the claimant. (R. 48.)

At the close of the testimony, the attorney for the plaintiff in error moved to direct the verdict on the ground of lack of jurisdiction; which motion was refused. (R. 48.) Plaintiff in error requested the following charge:

> "I charge you, that if you should find that the shock absorbers here attached were the property of the Richmond concern, your verdict would be for the defendant, since this court would have no jurisdiction of the defendant Robert H. Hassler, Inc., if the property were not theirs."

Which charge was refused and exceptions allowed. (R. 54.)

Upon this trial the jury failed to agree and a mistrial was ordered and the case came up again for trial. (R. 64, middle of page.)

Before the trial began attorneys for plaintiff in error asked the Court to first try the questions arising under claimant's intervention, and the Hassler Sales Agency insisted that the issues raised by the claimant should first be disposed of. This request was overruled. (R. 64.)

The Court was requested by both sides to frame issues to be submitted to the jury; which was refused and exception taken. (R. 64.)

Thereupon the case proceeded, and after the taking of testimony presented by both sides, and the argument of counsel, and the charge of the Judge, resulted in a

verdict of Fifteen Thousand Dollars against the defendant, Robert H. Hassler, Inc. (R. 64.)

Subsequently the issue as to the title of the property hereinabove referred to, was tried, and the same being adjudged against the Hassler Sales Agency a Writ of Error was taken to the Circuit Court of Appeals where judgment was reversed and the matter remanded for a new trial. (R. 70.) (*Hassler Sales Agency v. Shaw*, 295 Fed. Rep. 854.)

On May 5, 1924, upon trial by jury, title to the attached property was found to be in Hassler Sales Agency and the judgment of the court duly entered to that effect. (R. 71.)

Plaintiff in error filed a motion to set aside the verdict of Fifteen Thousand Dollars rendered on the second trial of the case by the jury against the plaintiff in error. At this time judgment had not been entered on said verdict. (R. 74.)

Defendant in error made a motion to enter up judgment on the verdict, which motion was filed on May 20, 1924. (R. 71.)

The motion to set aside the verdict was overruled by an order entered on May 16, 1924. (R. 74.)

The motion to enter judgment upon the verdict was sustained and judgment entered May 29, 1924. (R. 76.) The judgment of the court is as follows:

> "It is adjudged that plaintiff David C. Shaw recover of said defendant, Robert H. Hassler, Incorporated, Fifteen Thousand ($15.000.00) Dollars with interest from date of verdict, No-

vember 10, 1921, at seven per cent (7%) per annum so found with Two Hundred and Seventy-eight and 47/100 Dollars costs." (R. 78.)

Plaintiff in error moved to vacate the judgment on the ground that the court had no jurisdiction to try the case in which said judgment was rendered, or to enter the said judgment; which motion was refused on June 13, 1924. (R. 78.) An order was entered on May 29, 1924, the date upon which the final judgment in the cause was entered, referring the settling of the Bill of Exceptions in the cause to Honorable Henry A. M. Smith, United States Judge, and extending the time for the purpose of settling and filing the Bill of Exceptions. (R. 24, 25, 26.)

Objections of the defendant in error to the allowance of the Bill of Exceptions, were overruled. (R. 25.) Thereupon the Bill of Exceptions was settled, allowed and filed on June 27, 1924, before the Honorable Henry A. M. Smith, District Judge. (R. 26 to 71 incl.)

The Writ of Error and the allowance of the Writ were filed June 27, 1924, on which date service was accepted. (R. 81.)

ASSIGNMENT OF ERRORS.

The errors assigned are as follows (R. 80, 81.):

First: That the District Judge, Hon. Henry A. M. Smith, erred in declining to determine and decide the question of jurisdiction of its person raised originally in the State Court, afterwards renewed in the An-

swer of the defendant, and again upon the several trials of the cause, based upon the ground that the defendant R. H. Hassler, Inc., was not the owner of the property attached in this proceeding, before the case upon the merits for recovery of damages was tried before a jury.

Second: That the District Judge, Hon. Henry A. M. Smith, erred in assuming jurisdiction of the defendant, R. H. Hassler, Inc., and proceeding with the trial against him while the question of the jurisdiction of his person was undetermined, for that said jurisdiction depended upon the title to the property attached in the case, which title has since been held not to have been in said defendant but in the Hassler Sales Agency.

Third: Because the District Judge, Hon. Ernest F. Cochran, erred in refusing to set aside the verdict of $15,000 against the defendant R. H. Hassler, Inc., before judgment was entered thereon, for the reason that it then appeared that the title to the property attached under which jurisdicion of said defendant was claimed, had then been adjudged not to be in said defendant at the time of the levy of said attachment, and that therefore the District Court was without jurisdiction to try and determine the case.

Fourth: Because the District Judge, the Hon. Ernest F. Cochran, erred in allowing the plaintiff to enter up judgment upon the said verdict of $15,000, for that not sufficient showing was made warranting the entry of judgment at the time of the application

therefor, and for and in that it then appeared from the records of the Court that the Court was without jurisdiction to make any order in the premises, the said Court not having jurisdiction to try and determine the case in the first instance.

Fifth: Because the District Judge, the Hon. Ernest F. Cochran, erred in refusing the defendant's motion to vacate and set aside said judgment, for that the said District Court had not jurisdiction to try the case or enter the said judgment, it then appearing that the said District Court had no jurisdiction to try the said case in the first instance, the property attached upon which said jurisdiction was based having been found by the verdict of a jury and the judgment of the Court not to have been the property of the defendant, R. H. Hassler, Inc., when said action was begun and said attachment issued.

ARGUMENT.

1. The judgment to be reviewed is a personal judgment for the sum of $15,000.00 with interest from November 10, 1921, at seven per cent. per annum rendered May 29, 1924, against plaintiff in error, a non-resident of South Carolina, in a case in which no process was ever served upon it within the State of South Carolina; no property belonging to it was ever seized; in which it never voluntarily appeared nor submitted itself to the jurisdiction; in which at the threshold it appeared specially to object to the want of jurisdiction of its person or property and for no other purpose and at all stages of the case thereafter asserted its objection to such want of jurisdiction and upon the record reserved its special appearance and such objection.

2. At the time of the commencement of this action in the state court there was in force in South Carolina "An Act to Regulate the Procedure before Courts or Other Tribunals when Objection is Made to the Jurisdiction"; approved February 21, 1919, Stat. at L. (Acts) South Carolina, 1919, No. 39, p. 55, which reads as follows:

> "Section 1. When in any case or proceeding before any Court or other Tribunal any party shall appear for the sole purpose of objecting to the jurisdiction of such Court or Tribunal, and such Court or Tribunal shall upon such objection being made overrule the same, such party may give notice, either to the Court or Tribunal or the opposing party, that he in-

tends to rely on such jurisdictional objection or reserve his rights thereunder. Upon the overruling of such objection to the jurisdiction and giving of such notice, such party may thereafter appear generally or answer or plead or contest upon the merits, and such general appearance, answer, pleading or contest upon the merits shall not be deemed a waiver of the objection to the jurisdiction."

"Section 2. The notice required by Section 1 of this Act need not be in any special form or in the exact language of this chapter, but any notice which informs the Court, Tribunal or opposing party in substance of the intention of the party to rely on the objection made, or reserving his rights thereunder, shall be deemed a sufficient notice. The notice may be oral, if given to the Court or Tribunal in the presence of the opposing party or his attorney, in which case it shall be the duty of the Court or Tribunal to make note of the same, so as to preserve the rights of the party, but in all other cases such notice shall be in writing. Notice to the attorney representing any party shall be deemed notice to the party."

3. Before the time for answering in the cause in the state court, the attorneys for plaintiff in error in writing served upon attorneys for defendant in error and filed in court a notice that they appeared specially and not generally, and for the sole purpose of objecting to the jurisdiction of such court; they made their motion supported by affidavits (R. 27); the defendant in error opposed the motion to set aside the service of the summons by counter-affidavits; the Court overruled the objection to the jurisdiction and entered of record

an order: "That said motion be, and the same hereby is, refused, without prejudice, however, to the right of defendant to set up such special defense in its answer as to the jurisdiction of the Court as it may deem advisable." (R. 37.) Thereupon by its answer (R. 6) and its amended answer (R. 19, 20) in the District Court it reserved its qualified appearance and objection of want of jurisdiction. At both trials it requested the trial court to try the question of the right of the attached property and determine the question of jurisdiction before a trial upon the merits. (R. 48, R. 64.) After it had been tried and adjudged that the attached property was not the property of plaintiff in error but belonged to a stranger, it moved to set aside the verdict and dismiss the cause for want of jurisdiction (R. 74). It objected to the judgment for want of jurisdiction (R. 76) and after the judgment was rendered it moved to vacate it for want of jurisdiction. (R. 78.) At all times the court below refused to rule upon the question of jurisdiction. But the trial judge by his action in proceeding to try the merits before trying the title to the attached property, assumed jurisdiction erroneously. The judge then sitting who rendered the final judgment by so doing assumed jurisdiction. So in effect the objection to jurisdiction asserted continuously at all stages of the cause by plaintiff in error, was overruled. The error was reserved. It is properly here for review.

4. The District Courts of the United States, in the districts in South Carolina, are bound by the provi-

sions of the South Carolina Statute (Acts of South Carolina, 1919, No. 39, p. 55), regulating the manner in which objections to the jurisdiction of courts shall be made, and, where such objection to the jurisdiction is overruled, reserving the right to the objecting party to "thereafter appear generally, or answer or plead or contest upon the merits" without waiving the objection to the jurisdiction.

> "Under (the Conformity Act, Rev. Stats. Sec. 914, 17 Stat. 197) the Circuit Courts of the United States follow the practice of the Courts of the State in regard to the form and order of pleading, including the manner in which objections may be taken to the jurisdiction, and the question whether objections to the jurisdiction and defenses on the merits shall be pleaded successively or together. (*Delaware County Comrs. v. Diebold Safe & L. Co.*, 133 U. S. 473, 488; *Roberts v. Lewis*, 144 U. S. 653.)"
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> *Southern Pac. Co. v. Denton*, 146 U. S. 202, 209.

5. The South Carolina Statute (Acts of South Carolina, 1919, No. 39, p. 55), is merely declaratory of the law as announced by this court that "illegality in a proceeding by which jurisdiction is to be obtained, is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity; nor is the objection waived when, being urged, it is overruled and the defendant is thereby compelled to answer. He is not considered as abandoning his objection because he does not submit to further proceedings without contestation. It is only where

he pleads to the merits in the first instance, without insisting upon the illegality, that the objection is deemed to be waived."

Harkness v. Hyde, 98 U. S. 476, 479;
Southern Pacific Co. v. Denton, 146 U. S. 202, 209;
Mexican Central R. Co. v. Pinkney, 149 U. S. 194, 209;
Davis v. O'Hara (Dec. Nov. 24, 1924), 45 Sup. Ct. Rep. 104.

6. It is fundamental in jurisprudence that no court can exercise at common law jurisdiction over a party unless he is served with the process within the territorial jurisdiction of the court or voluntarily appears.

Pennoyer v. Neff, 95 U. S. 714;
Kendall v. United States, 37 U. S. (12 Pet.) 524;
Harris v. Hardeman, 55 U. S. (14 How.) 334;
Mexican Central R. Co. v. Pinkney, 149 U. S. 194, 209.

7. Plaintiff in error's petition to remove and the removal of the case from the state court to the United States District Court for the Eastern District of South Carolina did not amount to a general appearance or waiver of its objection to the jurisdiction no matter whether the appearance in the state court was stated

to be special and for the purpose of presenting the removal petition or whether it was without restriction of purpose of such appearance.

Goldey v. Morning News Co., 156 U. S. 518, 526;
Wabash Western Railway v. Brow, 164 U. S. 271-279;
Mechanical Appliance Co. v. Castleman, 215 U. S. 437-441;
Cain v. Commercial Pub. Co., 232 U. S. 124-131;
General Investment Co. v. Lake Shore and M. S. R. Co., 260 U. S. 261-268.

8. The Court below, never, at any time, had jurisdiction of the person of the defendant. The only jurisdiction it had in the case was over certain property attached as the property of the defendant.

After the appeal in *Hassler Sales Agency v. Shaw* (295 Fed. Rep. 854), and the subsequent re-trial of the issue as to the title to the attached property, and the rendition of judgment that the attached property was, at the time the warrant of attachment was issued and served, the property of Hassler Sales Agency, the Court below had exhausted its jurisdiction and it no longer had any power or authority to enter a further judgment *in personam* against the defendant, plaintiff in error.

The final judgment appealed from was *coram non judice.*

13 *Corpus Juris*, 1235, Tit. "*Coram non judice*";
Little v. Dyer, 138 Ill. 272, 281; 27 N. E. 905; 32 Am. St. R. 140.

9. On May 8, 1924, plaintiff in error served notice on defendant in error of a motion to set aside the verdict. This motion was heard on May 12, 1924. On May 16, 1924, the court filed its opinion and entered its order refusing the motion to set aside the verdict and dismiss the complaint. (R. 74, 75, 76.) Thereupon after notice a motion was made before Judge Cochran, D. J., by attorneys for the defendant in error for leave to enter up judgment and on May 29, 1924, the judge filed his opinion and order sustaining the motion to enter up judgment. (R. 76, 77, 78.)

Said judgment having been entered attorneys for plaintiff in error after due notice moved to vacate the said judgment upon the ground that the court had no jurisdiction to try the case in which the said judgment was rendered or to enter said judgment; which motion was refused by Judge Cochran who on June 13, 1924, filed his opinion and order refusing said motion to vacate. (R. 78.)

On May 29, 1924, the day on which the judgment was entered, an order extending the special term which commenced April 21, 1924, and extending jurisdiction of the court over this case for a period of 60 days from the date of that order for the purpose of settling bills of exception, was also entered (R. 24), the time for

preparing and serving proposed bills of exception was extended for a period of 30 days from the date of the order. (R. 24, 25.)

Two bills of exceptions were settled, signed by Judges Smith and Cochran respectively and filed on June 27, 1924.

The bill of exception settled and filed on June 27, 1924, before Honorable Henry A. M. Smith, U. S. District Judge, commences on page 26 of the printed record and ends on page 71.

The bill of exception settled and filed on June 27, 1924, before Honorable Ernest F. Cochran, District Judge, begins on page 71 of the printed record and ends on page 79. No objection to this bill has ever been made.

10. With the exception of that part of the first bill of exception printed at pages 48 to 64, both inclusive, all of this bill of exceptions set forth the summons and return thereon, the pleadings in the case, motions and order-book entries representing rulings on motions in the case. All of this matter is part of the "technical record" or "record proper" or "strict record" or "judgment roll," as it has been variously called, without bill of exceptions.

11. "By the judgment, we are to understand, not that part of the record, which in a suit at the common law technically follows the *ideo consideratum est, etc.;* for that would be wholly unintelligible, without reference to the preceding pleadings and proceedings; but that which, in common, as well as legal language, is

deemed the exemplification of a judgment; that is to say, all the pleadings and proceedings on which the judgment is founded, and to which as matter of record it necessarily refers."

Mr. Justice Story in *Owings v. Hull*, 34 U. S. (9 Pet.) 607, 624.

12. Upon the writ of error from the final judgment, errors of law appearing on the face of the record proper may be availed of without resorting to a bill of exceptions or other equivalent proceeding.

Suydam v. Williamson, 61 U. S. (20 How.) 427;

Nalle v. Oyster, 230 U. S. 165, 176, 177, 178, 179;

Denver v. Home Savings Bank, 236 U. S. 101-104;

Moline Plow Company v. Webb, 141 U. S. 616, 623;

City of Aurora v. West, 74 U. S. (7 Wall.) 82-91;

Bennett v. Butterworth, 52 U. S. (11 How.) 669, 675, 676.

13. All of the papers filed and orders made by the court in the Common Pleas Court of Sumter County, South Carolina, and the order of that court made on the motion to set aside the service of process in that court, are included in the transcript of the proceedings in that court, taken, on removal, to the United States

District Court, together with the Petition for Removal, Bond and Order of Removal and are part of the "record proper."

The statute expressly requires the filing of such transcript of the record in the state court, in the District Court of the United States on removal. Petitions for removal and motions to remand are matters of record proper. Ordinarily papers filed in support thereof are not so unless made part thereof by bills of exception, though sometimes this is otherwise.

McDonnell v. Jordan, 178 U. S. 229, 234.

Plaintiff in error insists that the bill of exceptions settled and signed by Judge Smith within the term at which the judgment was rendered, as extended by order of court, and being as it is a bill of exceptions of the record and not a bill of exceptions of the evidence was settled and filed within the time when the court retained full jurisdiction for the settling of the exceptions and is therefore properly a part of the record. Both of these bills of exception refer to the rulings on the motion to set aside the verdict and dismiss the complaint, which was filed on May 8, 1924, after it had been determined upon the filing of the mandate from the Circuit Court of Appeals of the Fourth Circuit, May 5, 1924 (R. 71) that the property attached was not the property of plaintiff in error.

14. When judgment was entered May 29, 1924, over the objection of plaintiff in error (R. 76, 77, 78) on June 13, 1924, and within the term, plaintiff in

error filed its motion to vacate the judgment. (R. 78). The order extending the special April Term for 60 days was entered on May 29, 1924, the date the judgment was entered (R. 24).

By that order it plainly appears that the bill of exceptions heard, settled and signed before Honorable Henry A. M. Smith, United States Judge, was a part of the bill of exceptions on the overruling of the motions to dismiss the cause, objection to judgment, and to vacate the judgment. (R. 24.) These matters were all based on the contention that the court never at any time had any jurisdiction in the cause either of the person or the property of the plaintiff in error. (R. 74, 75.) The bills of exception therefore, were filed in the term at which the motions were made, and overruled and exceptions taken, and while the record was *in fieri* and within the power of the Court.

Baxter v. Buchholz-Hill Trans. Co., 227 U. S. 637, 638;
Henderson v. Carbondale Coal & Coke Co., 140 U. S. 25, 48;
Bronson v. Schulten, 104 U. S. 410, 415;
Phillips v. Ordway, 101 U. S. 745, 752.

15. Furthermore Judge Smith by an order of June 27, 1924 (R. 25, 26), enlarged the time for allowing the bill of exceptions as to matters taking place at the trial of the cause, and stated that "the circumstances of this case being such as in the opinion of the court call for the allowance of such enlargement and no legal prejudice on the merits whatsoever resulting therefrom to the plaintiff" for that reason the enlargement would be allowed.

In *Mueller v. Ehlers*, 91 U. S. 249, 251, the court states the rule and the exception as follows:

> "As early as *Walton v. United States*, 9 Wheat. 651, the power to reduce exceptions taken at the trial to form and to have them signed and filed was under ordinary circumstances confined to a time not later than the term at which the judgment was rendered. This, we think, is the true rule and one to which there should be no exception *without an express order of the court during the term or consent of the parties, save under very extraordinary circumstances.*" (Italics ours.)

This court found circumstances to justify the application of this exception in *United States v. Breitling*, 61 U. S. (20 How.) 252, 254;

Michigan Insurance Bank v. Eldred, 143 U. S. 293, 298;

Exporters, etc., v. Butterworth-Judson Co., 258 U. S. 365, 368.

16. The objection to the jurisdiction at the trial of the cause was reserved by the trial court (R. 66) and it was never decided until it was passed upon by Judge Cochran upon the motion to set aside the verdict and dismiss the action, (R. 74, 75) and the motion to vacate the judgment. (R. 78, 79.)

The verdict upon the main issue for damages was tentative only and remained tentative pending the trial of the ownership of the attached property which was not decided until May 5, 1924, on the coming down of the mandate from the Circuit Court of Appeals of the Fourth Circuit, (R. 71) being the term at which the motion to set aside the verdict and dismiss the action,

NOTICE AND MOTION

Supreme Court of the United States

OCTOBER TERM, 1925

No. 278

R. H. HASSLER, INC., Plaintiff in Error,

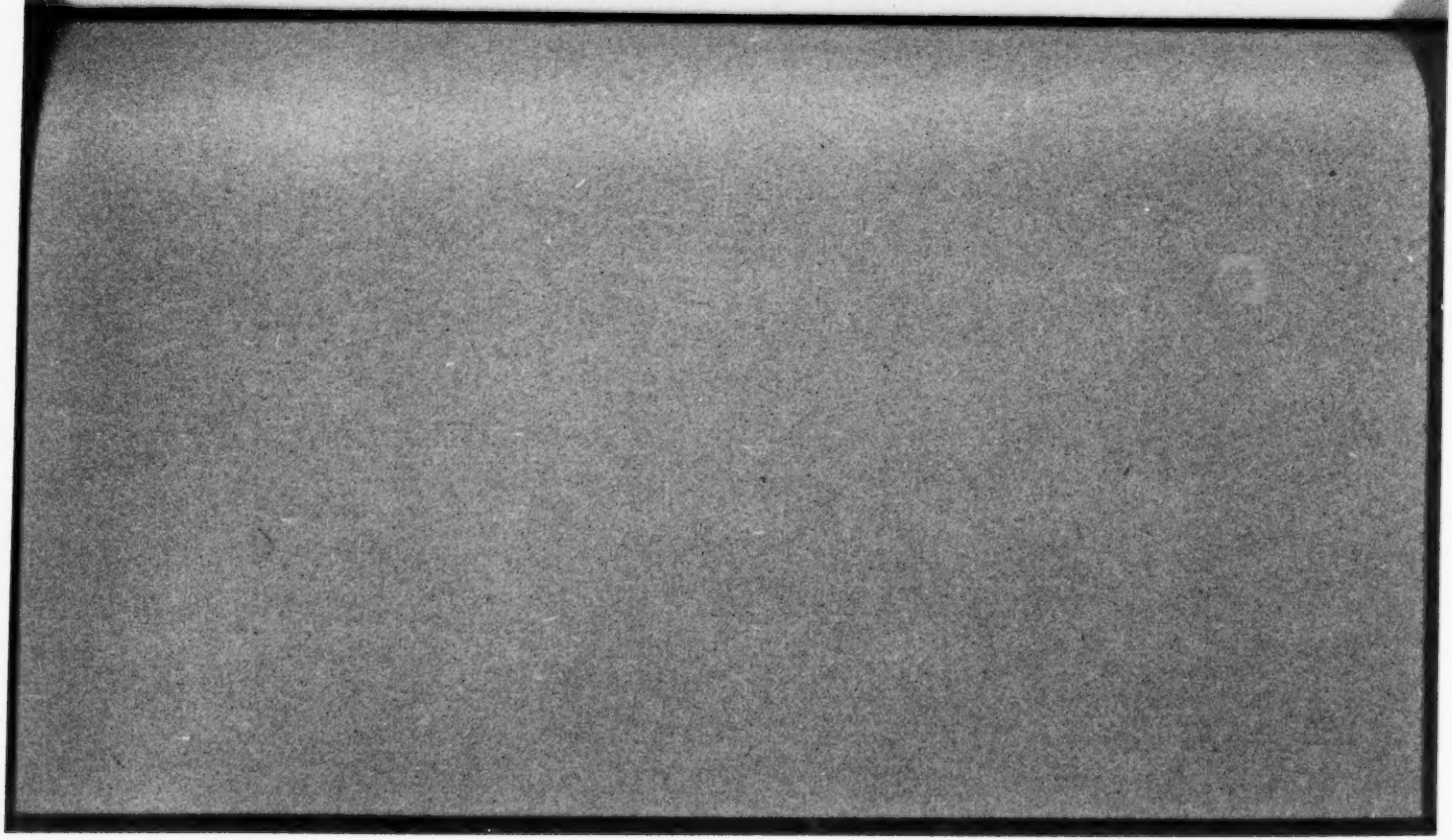
vs.

DAVID C. SHAW, Defendant in Error.

In Error to the District Court of the United States for the Eastern District of South Carolina, Transferred from the United States Circuit Court of Appeals for the Fourth Circuit

(20, 870)

L. D. JENNINGS,
A. S. HARBY,
Counsel for Defendant in Error.



(30,870)

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No. 278

R. H. HASSLER, INC., Plaintiff in Error,

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In Error to the District Court of the United States for the Eastern District of South Carolina, Transferred from the United States Circuit Court of Appeals for the Fourth Circuit

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NOTICE.

To Messrs. Rutledge, Hyde, Mann & Figg, Attorneys for Plaintiff in Error:

You will please take notice that upon the call of the above entitled case for trial, Defendant in Error will present the motion hereto attached.

L. D. JENNINGS,
A. S. HARBY,
Counsel for Defendant in Error.

(30,870)

Supreme Court of the United States

OCTOBER TERM, 1925

No. 278

R. H. HASSLER, INC., Plaintiff in Error,
vs.
DAVID C. SHAW, Defendant in Error.

In Error to the District Court of the United States for the Eastern District of South Carolina, Transferred from the United States Circuit Court of Appeals for the Fourth Circuit

MOTION.

Now comes the defendant in error, D. C. Shaw, and moves the Court to strike from the transcript of record herein the Bill of Exceptions as to proceedings before the Honorable Henry A. M Smith, District Judge (the same commencing on page 26 and terminating on page 71 of the said transcript), for the following reasons and upon the following grounds, to wit:

1. Because the said District Judge was without jurisdiction on June 27, 1924, when the said Bill of Exceptions was presented, settled and signed to settle and sign the

same, for the raason that (a) the time provided by the rule of Court for presenting a bill of exceptions had expired, (b) that the term at which the action was tried had ended, and (c) the defendant in error duly objected and excepted to the settlement and signing of said Bill of Exceptions.

2. The District Judge was without jurisdiction to enlarge and continue the time for presenting a Bill of Exceptions, for the reason that (a) the time provided by standing rule had expired, without an application for such enlargement having been made within said time, and (b) the term at which the cause was tried and judgement rendered had expired nearly three years prior to the attempted enlargement, without any reservation of jurisdiction over the cause.

The above motion will be made upon the record herein.

L. D. JENNINGS,
A. S. HARBY,
Attorneys for Defendant in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. 278.

R. H. HASSLER, INC., PLAINTIFF IN ERROR,

vs.

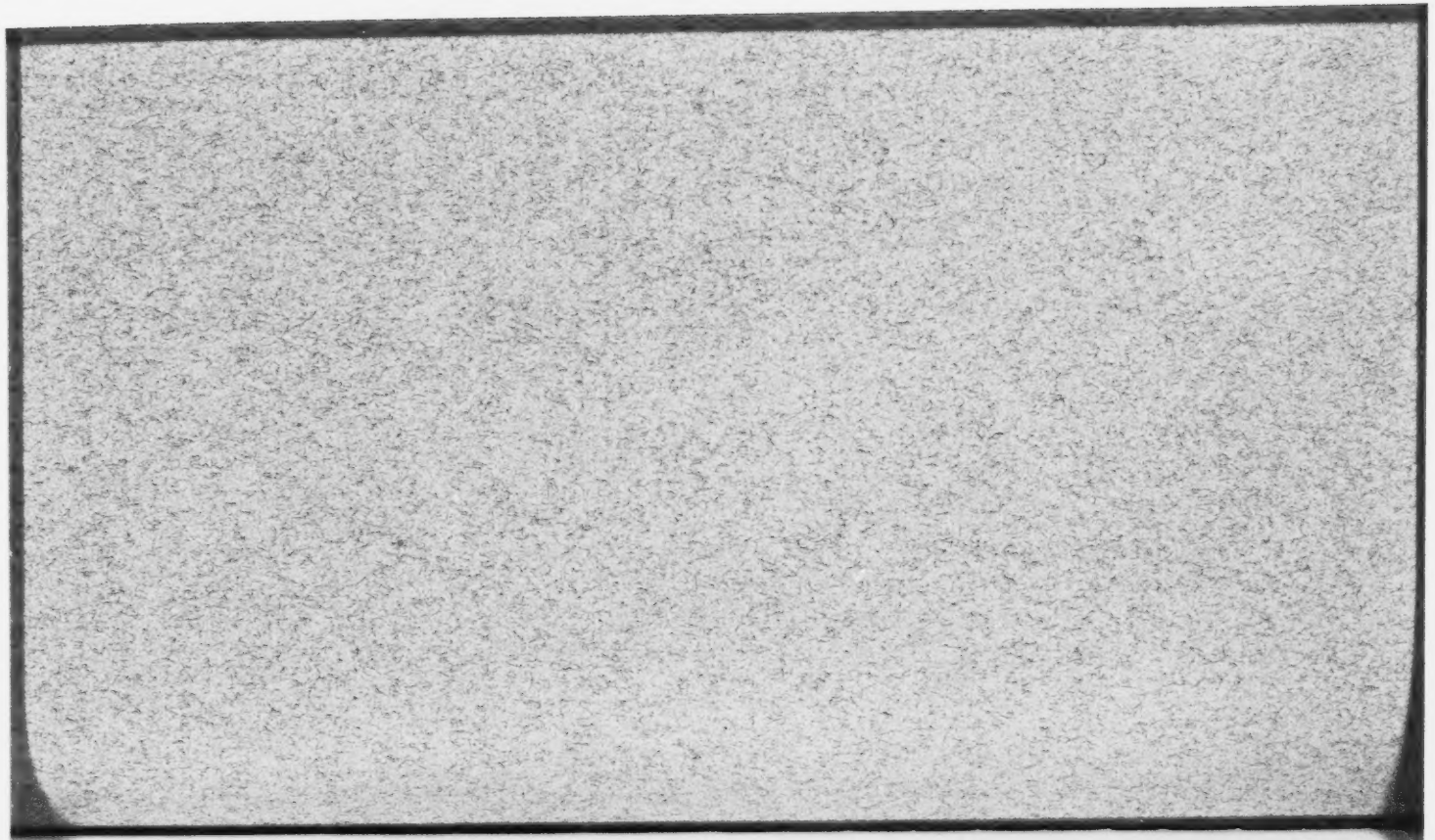
DAVID C. SHAW, DEFENDANT IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, TRANSFERRED FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR DEFENDANT IN ERROR.

L. D. JENNINGS,
A. S. HARBY,
Counsel for Defendant in Error.

(30,870)



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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. 278.

R. H. HASSLER, INC., PLAINTIFF IN ERROR,

vs.

DAVID C. SHAW, DEFENDANT IN ERROR.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, AT COLUMBIA.

BRIEF FOR DEFENDANT IN ERROR.

Preliminary Statement.

This is an action for damages in which D. C. Shaw was plaintiff below and Robert H. Hassler, Inc., was defendant, commenced in the Court of Common Pleas for Sumter County, S. C., and removed to the District Court of the United States for the Eastern District of

South Carolina, in which court it was tried before District Judge Smith and a jury on November 10, 1921, at a term ending December 5, 1921 (R., 71), resulting in a verdict and judgment in favor of plaintiff below in the sum of fifteen thousand dollars.

Through inadvertence and mistake judgment was not actually entered until May 29, 1924. In the meantime, on May 8, 1924, Hassler moved before District Judge Cochran, who had succeeded Judge Smith, to set aside the verdict upon grounds not set out in the record (R., 71), which motion was refused on May 16, 1924. After entry of the judgment, a further motion was made by Hassler to vacate the judgment upon the ground that the court had no jurisdiction to try the case, which motion was refused on June 13, 1924 (R., 78). A writ of error was allowed on June 27, 1924.

The Facts.

The record contains a bill of exceptions allowed by Judge Smith (R., 26-71). The defendant in error has moved to strike out this bill of exceptions, and does not consider it properly before the court. We, therefore, at this time forbear any reference to the contents of this bill of exceptions, and shall state the facts surrounding the controversy as they otherwise appear of record.

The summons and complaint, filed in the State court on May 5, 1919 (p. 7), were served on the defendant Hassler at Indianapolis, Indiana, on May 12, 1919 (R., 4). On September 3, 1919, Hassler filed its answer in the United States Court, setting up as a first defense a

plea to the jurisdiction of the court wherein it alleged that it was a corporation of the laws of Indiana, that it does not do business in South Carolina, and had neither officers, offices or property in said State. In the same defense it further set up that on May 24 it had made a special appearance before Judge Wilson of the State court and moved to set aside the service, which motion was refused by an order, a copy of which was attached to the answer as Exhibit A (R., 6).

NOTE.—Exhibit A is printed out of order on page 5.

The same answer contained a second defense directed to the merit of the controversy (R., 6).

On February 4, 1921, the defendant Hassler gave notice of a motion to amend this answer by setting up the Statute of Frauds (R., 14). On February 21 the motion was heard, and both plaintiff and defendant were allowed to amend. An amended complaint was filed on March 14, 1921 (R., 15), which was answered by the defendant Hassler on March 31, 1921, the amended answer containing a first defense to the jurisdiction, and a second defense to the merits (R., 19).

A trial on these pleadings was had on November 19, 1921, resulting in a verdict in favor of plaintiff for $15,000.00 (R., 23). No motion for a new trial was made and no step of any kind taken by the defendant Hassler until May 8, 1924, when a motion was made by it to set the verdict aside, which was refused by Judge Cochran (R., 74). It was then discovered by the plaintiff Shaw that judgment had not been entered, due to an oversight (R., 71), and, after motion on May

29, 1924, the court allowed the judgment entered, which was done on that day.

On the same day, Judge Cochran extended the April term, 1924, for a period of sixty days for the settlement of any bill of exceptions, providing that Judge Smith should hear, determine and settle all matters as to any bill of exceptions as to proceedings had before him (R., 24).

On June 27, 1924, the defendant Hassler presented to Judge Smith a bill of exceptions as to such proceedings, to the allowance of which the plaintiff Shaw objected (R., 25). Judge Smith overruled the objections (R., 25), allowing plaintiff an exception to his order.

So much and no more is shown by the record, omitting the Bill of Exceptions settled by Judge Smith.

Assignments of Error.

The first and second assignments of error complain because Judge Smith declined to determine the question of jurisdiction and tried the case while that question was undetermined.

The remaining assignments complain because Judge Cochran refused to set aside the verdict, because he permitted the entry of judgment, and because he declined to vacate the judgment; all on the ground that the court was without jurisdiction of the person of defendant.

There are, therefore, only two questions raised, to which we reply by asserting:

A. Judge Smith did not decline to determine the question of jurisdiction.

B. Judge Cochran had no power to set the verdict or judgment aside.

C. The defendant Hassler submitted itself to the jurisdiction of the court.

The Motion to Strike Out.

Whether or not the Bill of Exceptions settled by Judge Smith shall be deemed part of the record must be decided before these issues can be discussed.

The proper manner of raising this question is by motion to strike out.

> Exporters of Manufacturers' Products, Inc., *vs.* Butterworth-Judson Co., 258 U. S., 365; 66 L. Ed., 663.

A bill of exceptions must be presented at the trial term, or within time allowed by orders entered at the term, or by standing rule of court, and after the expiration of the term; without reservation of the court's control there is no authority for the allowance of a bill of exceptions.

> U. S. *vs.* Jones, 149 U. S., 262; 37 L. Ed., 762.
>
> Michigan Ins. Bank *vs.* Eldred, 143 U. S., 293; 36 L. Ed., 162.
>
> O'Connell *vs.* U. S., 253 U. S., 142; 64 L. Ed., 827.

During the term no action was taken to reserve control of the case, and the District Judge rests his authority for settling and allowing the bill upon Rule 44 of the District Court, which provides:

> "No bill of exceptions will be settled or allowed if not presented for settlement within sixty days after the rendition of the verdict in the cause, if tried before a jury * * * unless the time be enlarged by the Court or a Judge thereof."

Nothing contained in the rule extends the time beyond the term, or reserves to the judge the authority to enlarge the time after the expiration of the term. Hence, the exercise of the power of the judge to enlarge the term must be restricted to such period as he has general control over the case, *i. e.*, the term, and after the expiration of the term, when the court loses jurisdiction over its judgments and the cause no longer depends before it, the time for presenting a bill of exceptions could not be enlarged or such bill allowed.

O'Connell *vs.* U. S. and cases cited, *supra.*

Even consent of all parties would not justify such an allowance.

Exporters of Manufacturers' Products, Inc., *vs.* Butterworth-Judson Company, *supra.*

The effect of striking out the bill will be to eliminate from the printed transcript pages appearing in the transcript between pages 26 and 71, inclusive. The record cannot be supplemented by the contents of an improvidently issued bill, which in contemplation of law is no bill, even though the matters therein contained, by proper and timely steps, could have been made part of the record.

Suydam *vs.* Williamson, 20 How., 427; 15 L. Ed., 978.

BRIEF OF ARGUMENT.

Judge Smith Did Not Decline to Determine the Question of Jurisdiction.

The assignments of error assert that the District Judge declined to determine the question of jurisdiction raised by the pleadings; not that he erroneously decided it. There is nothing in the record which supports such an assertion. On the contrary, the record shows the question was raised by the first defense to the answer and amended answer (R., 6, 19), that the case went to trial on these pleadings and resulted in a verdict in favor of plaintiff, upon which judgment has been entered (R., 78). The inference is that the jurisdictional question was either waived or decided adversely to defendant Hassler.

It is stated in the brief of plaintiff in error that the verdict was a tentative one, for the purpose of fixing the amount of the claim, and was so considered by the District Judge. This is an erroneous statement. If the bill of exceptions is stricken from the record, there is nothing before this Court to show how the verdict was considered, except the statements of Judge Cochran.

> "I find here upon the record of this Court a verdict and do not think I have the power, under the cases referred to, to review the action of my predecessor, Hon. Henry A. M. Smith, and set that verdict aside after the expiration of the term at which it was rendered" (R., 77).
>
> "However, I desire to say that as I view it, the question of jurisdiction was one of the per-

son and not of the subject matter, and could be waived, and my predecessor, Hon. Henry A. M. Smith, U. S. District Judge, did assume jurisdiction and proceeded to the trial of the cause and the rendition of a verdict by a jury. He therefore took jurisdiction" (R., 78).

On the other hand, if the bill of exceptions remains in the record, it negatives the idea of a tentative verdict.

> "The Hassler Sales Agency insisted that the issues raised by the claimant should first be disposed of.
>
> "The Court held, however, that inasmuch as much of the testimony would have to be repeated upon the trial of each of these issues, the Court would first try the main case, *being the action for damages* * * *
>
> "Thereupon the *case* proceeded and after the taking of the testimony presented by both sides, the argument of counsel and the charge of the judge, resulted in a verdict of fifteen thousand dollars against the defendant, R. H. Hassler, Inc." (R., 64).

In the decree of Judge Smith on the intervention, he says:

> "The claimant sought to have the issue as to the validity of the attachment tried first, but inasmuch as it seemed to the Court that under the pleadings, much of the testimony would have to be repeated on each trial, and that it would be best in the speedy administration of justice that it should be first determined *whether the plaintiff could recover any judgment at all* against the defendant, Robt. H.

Hassler, Inc., that issue was directed to be tried first.

"Thereafter, at the November, 1921, term of this Court, the *main cause* herein between David C. Shaw, the plaintiff, and Robert H. Hassler, Inc., the defendant, came to trial before the Court and a jury, and a verdict for fifteen thousand dollars in favor of the plaintiff, David C. Shaw and against the defendant, Robert H. Hassler, was rendered by the jury; as to which no new trial has ever been granted, nor has any appeal or writ of error therefrom been taken" (R., 66). (Italics supplied.)

The language leaves no doubt that Judge Smith regarded the verdict as a final determination of the question of whether or not plaintiff *could* recover. There is no suggestion of a tentative submission here.

As a matter of fact, the verdict was never regarded by the plaintiff below as in any sense conditional, nor was it ever held by Judge Smith that judgment on this verdict should depend upon the issue as to the ownership of the attached property. In fact, Judge Smith expressly ordered that the question of waiver be decided with all other questions in the case at the trial of the *case on the merits* (R., 41). When the trial which resulted in the verdict was had, there is nothing in the record to show the preservation of any exception to Judge Smith's decision, or even that the point was made. At any rate, Judge Smith assumed jurisdiction, and no assignment of error complains of his so doing. The assignments allege he failed to determine the question, not that he determined it erroneously.

The fact that the record discloses no stipulation of counsel that the verdict be conditional, no order of the court compelling the defendant below to go to trial on this issue prior to the determination of the jurisdictional question, no exception of any kind to the action of the Judge in proceeding with the trial, and no assertion by the defendant below at the trial of its immunity from suit, together make a conclusive showing that in fact the position now assumed by the plaintiff in error was never taken in the court below, and that the determination of the trial by a verdict of the jury upon which judgment was duly entered must be considered as to the issue of jurisdiction in the same light as it is entitled to consideration, as a determination of every other issuable matter presented by the pleading.

The plaintiff in error in its brief undertakes to argue that Judge Smith was in error in deciding the jurisdictional question adversely to it, just as if an exception had been noted on this point, and the question presented to this Court by an assignment of error. In our view the rulings of Judge Smith on this point are not before this Court for no less than three reasons: (1) The record fails to show what these rulings were; (2) the record fails to show any exception to these rulings, and (3) the assignment of error covers no one of these rulings.

In its brief the plaintiff in error argues that certain excerpts from the charge of the court upon the trial which resulted in a mistrial became the law of the case and remained so, and that the plaintiff in error was entitled to and did rely upon them as the law. In the first place, this charge is not properly before this

Court, for the reasons assigned in the motion to strike out the bill of exceptions. In the second place, we are unable to agree with counsel in the conclusion that instructions to the jury upon a trial which results in a mistrial are binding upon any one as the law of the case. This is indeed a novel proposition, and we note from counsel's brief is without the support of any cited authorities.

Needless to say, we disagree with the statements contained on page 11 of the brief of plaintiff in error, to the effect that the verdict in this case was subject to the Court's reservation of the jurisdictional question, and could not be called a complete and valid verdict. The record shows no such reservation, and so far as the defendant in error then knew or now knows the verdict was a complete and final determination of all issues of law and fact raised by the pleadings between the plaintiff and Robt. H. Hassler, Inc., subject to such review of errors of law as might be had in this Court. The verdict did not conclude the intervenor, Hassler Sales Agency, which was not party to the trial, nor did the trial of the question of title between plaintiff and the intervenor conclude the defendant Hassler, nor the plaintiff as regards the defendant Hassler.

To Summarize: The jurisdictional question was neither ignored nor passed over; the verdict was in no sense tentative or conditional; but was a final determination of all issues plead, and the only inference to be drawn from the record is either that the question of jurisdiction was decided against plaintiff in error, or was waived by it.

Judge Cochran Had No Power to Set the Verdict or Judgment Aside.

The verdict was rendered November 10, 1921, during the term which expired on December 5, 1921. No motion for a new trial was made, nor were any other proceedings taken to reserve to the court control over the case. The application to Judge Cochran was not made until May 8, 1924, long after the expiration of the term. The grounds of the application are not stated in the record, but sufficient appears from Judge Cochran's order (R., 74) to show that the case falls within no exception to the general rule that after the expiration of the term, the court is without power to set aside or modify a verdict or judgment rendered during the term. Judge Cochran cites in support of this rule, Harley *vs.* U. S., 269 Fed., 384; U. S. *vs.* Mayer, 236 U. S., 55; Abbott *vs.* Brown, 241 U. S., 606; *In re* Metropolitan Trust Co., 218 U. S., 312; Greyer-Biehl *vs.* Hughes Electric Co., 294 Fed., 802. In addition to these cases, we call the attention of the court to Wetmore *vs.* Karrick, 205 U. S., 141; 51 L. Ed., 745. The opinion in this case contains an elaborate review of previous decisions of the United States Supreme Court, which may be summarized in the quotation from Bronson *vs.* Schulten, 104 U. S., 410; 26 L. Ed., 797, as follows:

> But it is a rule equally well established, that after the term has ended all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or cor-

rect them; and, if errors exist, they can only be corrected by such proceeding by a writ of error or appeal as may be allowed in a court which, by law, can review the decision. So strongly has this principle been upheld by this court, that, while realizing that there is no court which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the court for the term at which the judgment was rendered. And this is placed upon the ground that the case has passed beyond the control of the court.

We call attention to Phillips *vs.* Negley, 117 U. S., 665; 29 L. Ed., 1013. In this case the court says, commenting upon the decision in Bronson's case:

> "Although the opinion (Bronson case) also shows that upon the facts of that case the action of the circuit court in vacating its judgment after the term could not be justified upon any rule authorizing such relief, whether by motion or by bill in equity, nevertheless the decision of the case rests upon the emphatic denial of the power of the court to set aside a judgment upon motion made after the term and grant a new trial, except in the limited class of cases enumerated as reached by the previous practice under writs of error *coram vobis*, or for the purpose of correcting the record according to the fact where mistakes have occurred from the misprision of the clerk. We content ourselves with repeating the doctrine of this recent decision, without recapitulating previous cases in this court, in which the point has been noticed, for the purpose of showing their harmony. It has been the uniform doctrine of this court.

> 'No principle is better settled,' it was said in Sibbald *vs.* United States, 12 Pet., 488, 492; 9 L. Ed., 1167, 1169, 'or of more universal application, than that no court can reverse its own final decrees or judgments for errors of fact or law, after the term in which they have been rendered, unless for clerical mistakes (Cameron *vs.* M'Roberts, 3 Wheat., 591; 4 L. Ed., 467; Bank of Commonwealth *vs.* Wistar, 3 Pet., 431; 7 L. Ed., 731), or to reinstate a cause dismissed by mistake (The Palmyra, *supra*): from which it follows that no change or modification can be made, which may substantially vary or affect it in any material thing. Bills of review, in cases in equity, and writs of error *coram vobis* at law, are exceptions which cannot affect the present motion.' ''

We further call attention to the case of Bank of the United States *vs.* Moss, 6 How., 31; 12 L. Ed., 331. In this case, after the expiration of the term, the Circuit Court, on motion of defendant, set aside a verdict and dismissed a case for what it considered to be a want of jurisdiction. The plaintiff below excepted, and the Supreme Court of the United States, speaking through Mr. Justice Woodberry, held that the power of the Circuit Court had been exhausted and ended with the expiration of the term, and that after the term the court was without authority to change its decision or reverse it.

The case of Tubman *vs.* B. & O. Railroad Co., 190 U. S., 38; 47 L. Ed., 946, affirms Bronson *vs.* Schulten, and Phillips *vs.* Negley.

The Court Obtained Jurisdiction Over the Defendant Hassler.

It is the contention of the defendant in error that the District Court acquired jurisdiction over the defendant Hassler regardless of the method employed in serving the summons and complaint, by (*a*) the plea of said defendant to the merits of the case before the question of jurisdiction was determined, and (*b*) the failure of the defendant to raise any exception to the jurisdiction of the court upon the trial of the case.

If the bill of exceptions be stricken out in accordance with the motion made, the record shows merely that the defendant in the first instance appeared by answer containing objections to the jurisdiction of the court and a general defense to the merit, upon which it went to trial without making any exception to the court's rule on the jurisdictional point, or without preserving this ruling, and attempts now, after all other issues are decided against it, to raise the question of jurisdiction of its person in this Court.

If, on the other hand, the motion to strike out the bill of exceptions fails, the record shows that the summons and complaint were served personally upon defendant, though such service was made without the State of South Carolina. Thereafter the defendant appearing especially in the State court moved to set aside the service. The motion was refused without prejudice, leaving the question of jurisdiction still open. Promptly thereafter the defendant filed in the State court a petition and bond for removal. There-

after, without renewing its motion to set aside the service, or without saving the right to do so, the defendant filed its answer, which contained a first defense to the jurisdiction of the court, and a second defense upon the merits. Thereafter the cause was tried, at which trial the court refused to direct a verdict in favor of the defendant on the question of jurisdiction, and refused to peremptorily charge the jury that the court would have no jurisdiction if the attached property was not that of the defendant Hassler. This trial resulted in a mistrial, and when the cause came on for trial again the record shows that the defendant entered into the trial, offered testimony and took no steps to raise the jurisdictional question, or to except from the Judge's rulings thereon, or to preserve its rights under the first defense of its answer.

In support of its position, the defendant in error advances the following points:

1. The question involving the jurisdiction of a Federal court is not controlled by State statutes or decisions.

Mechanical Appliance Co. *vs.* Casselman, 215 U. S., 437; 54 L. Ed., 272.

Moreover, in cases which concern the jurisdiction of the Federal courts, notwithstanding the so-called Conformity Act, neither the statutes of the State nor the decisions of its courts are conclusive upon the Fed-

eral courts. The ultimate determination of such questions of jurisdiction is for this Court alone.

See also

Western Loan & Savings Co. *vs.* Butte and Boston, etc., 210 U. S., 681; 52 L. Ed., 1101.

2. The suit being one between a resident of South Carolina and an Indiana corporation, United States District courts in either South Carolina or Indiana had general jurisdiction of the subject matter of the action. Defendant's privilege to be sued in Indiana could have been waived.

Ex parte Schollenberger, 96 U. S., 378; 24 L. Ed., 853 (quoted in *Ex parte* Moore, *infra*).

The act of Congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the court. It is rather in the nature of a personal exemption in favor of the defendant, and it is one which he may waive. If the citizenship of the parties is sufficient, a defendant may consent to be sued anywhere he pleases, and certainly jurisdiction will not be ousted because he has consented.

Gracie *vs.* Palmer, 8 Wheat., 699; 5 L. Ed., 719.

Toland *vs.* Sprague, 12 Pet., 300; 9 L. Ed., 1093.

First Nat'l Bank *vs.* Morgan, 132 U. S., 141; 33 L. Ed., 282.

St. Louis, etc., R. Co. *vs.* McBride, 141 U. S., 127; 35 L. Ed., 659.

Central Trust Co. *vs.* McGeorge, 151 U. S., 129; 38 L. Ed., 98.

3. Filing a petition for removal was such a waiver, and amounted to a consent to the jurisdiction of this Court.

Ex parte Moore, 209 U. S., 490; 52 L. Ed., 904 (overruling *Ex parte* Wisner, 203 U. S., 449).

Moore, a citizen of Illinois, instituted this case in the State courts of Missouri against the L. & N. R. R. Co. Thereafter, on petition of the defendant, the case was removed to a United States District Court in Missouri. Moore filed an amended petition in that court, and entered into various stipulations as to continuing the case from time to time. Subsequently, he moved to remand, upon the ground that neither he nor the defendant were residents of Missouri, and the cause could not have been brought in that State. The Supreme Court held that, since there was a diversity of citizenship, District courts generally had jurisdiction, and the provisions of the statute as to the particular district in which the action should be maintained could be, and had been waived by both plaintiff and defendant.

In part, the court said:

> "That the defendant consented to accept the jurisdiction of the United States Court is obvious. It filed a petition for removal from the state to the United States Court. No clearer expression of its acceptance of the jurisdiction of the latter Court could be had * * *
>
> "As held in Kinney *vs.* Columbia Sav. & L. Asso., 191 U. S., 78; 48 L. Ed., 103, a petition and bond for removal are in the nature of pro-

cess. They constitute the process by which the case is transferred from the state to the Federal court, and if, when the defendant is brought into a Federal Court by the service of original process, he can waive the objection to the particular court in which the suit is brought, clearly the plaintiff, when brought into the Federal Court by the process of removal, may in like manner, waive his objection to that court. So long as diverse citizenship exists, the circuit courts of the United States have a general jurisdiction. That jurisdiction may be invoked in an action originally brought in a circuit court or one subsequently removed from a state court, and if any objection arises to the particular court which does not run to the circuit courts as a class, that objection may be waived by the party entitled to make it. As we have seen in this case, the defendant applied for a removal of the case to the Federal court. Thereby he is foreclosed from objecting to its jurisdiction."

4. Defendant's plea to the merits of the case was also a waiver, and submitted it to the jurisdiction of the court.

St. Louis Ry. Co. *vs.* McBride, 141 U. S., 127; 35 L. Ed., 659.

In this case, plaintiffs, citizens of Arkansas, brought suit in the Circuit Court for the Western District of Arkansas against the defendant Railway Company, a corporation and citizen of Missouri. The first plea made by the defendant was a demurrer on three grounds: First, because the court had no jurisdiction of the person of the defendant; Second, because the

court had no jurisdiction of the subject matter of the action, and Third, because the complaint did not state facts sufficient to constitute a cause of action. The Supreme Court said, in disposing of the jurisdictional questions on writ of error:

> "Assuming that service of process was made * * * and that the defendant did not voluntarily appear, its first appearance was not to raise the question of jurisdiction *alone* but also that of the merits of the case. Its demurrer, as appears, was based on three grounds—two referring to the question of jurisdiction, and the third that the complaint did not state facts sufficient to constitute a cause of action. There was, therefore, in the first instance, a general appearance to the merits. If the case was one of which the court could take jurisdiction, such an appearance waives not only all defects in the service, but all special privileges of the defendant in respect to the particular court in which the action is brought."
>
> Interior Const. & Imp. Co. *vs.* Gibney, 160 U. S., 217; 40 L. Ed., 401.

> "The circuit courts of the United States are thus vested with general jurisdiction of civil actions involving the requisite pecuniary value, between citizens of different states. Diversity of citizenship is a condition of jurisdiction, and when that does not appear upon the record, the court of its own motion will order the action to be dismissed. But the provision as to the particular district in which the action shall be brought does not touch the general jurisdiction of the court over such a cause between such parties, but affects only the proceeding taken to

bring the defendant within such jurisdiction, and is a matter of personal privilege, which the defendant may insist upon, or may waive, at his election; and the defendant's right to object that an action within the general jurisdiction of the court is brought in the wrong district is waived by entering a general appearance without taking the objection. (Citing cases.)"

Western Loan & Savings Co. *vs.* Butte & Boston Min. Co., 210 U. S., 368; 52 L. Ed., 1101.

In this case, suit was brought in the District of Montana, jurisdiction being based solely on diversity of citizenship of the parties, the plaintiff being a citizen of Utah and the defendant of New York. The defendant filed a demurrer, alleging, 1st, that the court had no jurisdiction of the subject of the action; 2d, the court had no jurisdiction of the person of the defendant; 3d, that the complaint did not state facts sufficient to constitute a cause of action; 4th, that the complaint was uncertain, and, 5th, that the complaint was unintelligible.

The sole question reviewed by the Supreme Court was whether or not the Circuit Court had jurisdiction. In holding that it had, the court enunciates the following propositions:

1st. That where diversity of citizenship exists, so that the suit is cognizable in some circuit court, the objection that there is not jurisdiction in a particular district may be waived by appearing and pleading to the merits.

2d. That notwithstanding the Conformity Act, the statutes and decisions of the State do not control, but the question is to be determined *altogether* and finally by the practice in the Federal courts as set forth in the decisions of the Federal Supreme Court.

3d. That the defendant by filing the demurrer on the grounds stated waived the question of jurisdiction.

The court follows the decision in the McBride case, *supra*, and points out that the defendant was at liberty to make a special appearance by motion aimed at the jurisdiction of the court over its person.

See also

Texas and Pacific Railroad Co. *vs.* Cox, 145 U. S., 593; 36 L. Ed., 827.

5. The order of Judge Wilson did not foreclose the waiver.

Defendant relies upon the order of Judge Wilson in the State court, which refused a motion to set aside the service of the summons "without prejudice, however, to the right of defendant to set up such special defense in its answer as to the jurisdiction of the court as it may deem advisable."

This proviso manifestly conferred no new rights on defendant. It merely left the way clear for it to assert the alleged lack of jurisdiction of the court, provided it did not waive its right to so do. Had the defendant set up nothing in its answer after its "first defense," Judge Wilson's order would not have precluded a consideration and decision of that defense. It is not

Judge Wilson's order now that precludes a consideration of these matters, but defendant's own act in joining with his "first defense" a plea to the merits of the action. Judge Wilson's order did not give him the right to do that.

6. The defendant further submitted itself to the jurisdiction of the court by going to trial without saving an exception as to the court's ruling on this point.

It appears from the record that although the defendant raised the issue of jurisdiction in its answer, there is no exception preserved as to Judge Smith's ruling on this question upon the trial of the case. It does not appear from the record that Judge Smith was called upon to rule upon it, and this case is brought within the rule announced in the case of German Alliance Insurance Co. *vs.* Hale, 219 U. S., 307; 55 L. Ed., 229, where the Supreme Court said:

> "The defendant did not stand upon his plea, and went to trial upon the merits of the case, without objection, and introduced evidence upon other issues in the case, but at the trial no evidence was offered or introduced on either side relating to the matters set out in the second plea. Under these circumstances, we are not required to consider the questions raised by that plea. On this record we may fairly assume that the defendant at the trial waived or abandoned the issues raised by the plea. Garrard *vs.* Reynolds, 4 How., 123; 11 L. Ed., 903, 905; Weed *vs.* Crane, 154 U. S., 570, and 19 L. Ed., 712; 14 Sup. Ct. Rep., 1215."

7. The decisions cited by plaintiff in error on the issue of waiver are totally inapplicable.

The plaintiff in error apparently relies upon Sections 406-7, South Carolina Code of Civil Procedure, as well as several decisions of the Supreme Court of the United States. The State statute is, of course, entirely inapplicable, as shown by the authorities herein contained, to the effect that notwithstanding the Conformity Act, State statutes are not binding upon the Federal court. The case cited by plaintiff in error of Mexican Railroad Co. *vs.* Pinkney, 149 U. S., 194, also establishes this. In the Pinkney case a statute of the State of Texas was disregarded, although under its terms the defendant had made a general appearance.

The general authorities cited by plaintiff in error on this point, to wit: Harkness *vs.* Hyde, 98 U. S., 476; Southern Pacific Co. *vs.* Denton, 146 U. S., 202, are various decisions to the same effect, are totally beyond the point for the reason that in all of these cases there was in the first instance an appearance in the Federal court by a plea to the jurisdiction or motion to set aside the service, and it was not until such plea or motion had been overruled that a further appearance was made.

In the case at bar, the first appearance in the Federal court included a plea to the merits of the case. While a motion to set aside the service was made in the State court, the merits of this motion were never determined, but it was merely refused without prejudice, which left the parties in the same plight as if the motion had never been made. In such cases the only proper practice would have been to have renewed the motion in the

Federal court, reserving the right to do so in a petition for removal. It is manifestly unfair for the plaintiff in error to have appeared upon the merits of the case, and to have joined issues in a litigation which has now extended over a period of more than five years, and after being defeated, upon the merits, at this late day to insist that the court is without jurisdiction.

Conclusion.

On the whole case it is most respectfully submitted that the bill of exceptions appearing in the record as to proceedings before Judge Smith should be stricken out; that the question of jurisdiction cannot be considered by this Court, for the reason that no exceptions were reserved to the action of the trial judge in assuming jurisdiction of the cause and trying the issues raised by the pleadings; that the verdict is in no way a conditional one; that, as a matter of fact, the court had jurisdiction of the subject matter, and obtained jurisdiction over the defendant Hassler by reason of it submitting itself to that jurisdiction. It is further respectfully submitted that Judge Cochran had no power to set the verdict or judgment aside, and that for these reasons the judgment of the court below should be affirmed.

Respectfully submitted.

L. D. JENNINGS,
A. S. HARBY,
Attorneys for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

No. 278.—October Term, 1925.

R. H. Hassler, Inc., Plaintiff in Error, *vs.* David C. Shaw.	In Error to the District Court of the United States for the Eastern District of South Carolina, transferred from the United States Circuit Court of Appeals for the Fourth Circuit.

[May 10, 1926.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a writ of error upon a judgment *in personam* against the plaintiff in error on the ground that there never was any valid service of process against it and that therefore there was no jurisdiction in the Court. The writ was transferred from the Circuit Court of Appeals to this Court, the case being one in which the jurisdiction of the District Court and that alone was in issue within the meaning of § 238 of the Judicial Code, under the decisions in *Shepard* v. *Adams*, 168 U. S. 618; *Remington* v. *Central Pacific R. R. Co.*, 198 U. S. 95, and *Board of Trade* v. *Hammond Elevator Co.*, 198 U. S. 424; and therefore not open to review in the Circuit Court of Appeals. The *Carlo Poma*, 255 U. S. 219.

The suit is for an alleged breach of contract and was brought in a Court of the State of South Carolina against a corporation of Indiana. The only personal service was by delivery of copies of the summons and complaint in Indiana, on May 12, 1919, as the record shows. An attachment was levied on property alleged to belong to the defendant and within the State. The record further shows that in the same month the defendant moved to set aside the service, and that the motion was refused, without prejudice to the defendant's right to set up the special defence in its answer, this being a right clearly given by the statutes of South Carolina. The case then was removed to the District Court of the United States

and subsequently in September of the same year an answer was filed alleging the above mentioned motion and order, and setting up that the Court had no jurisdiction, because the defendant was an Indiana corporation doing no business and having no property within the State upon which attachment could be levied so as to give the Court jurisdiction, and also, reserving its right to object to the jurisdiction, pleading to the merits. In March, 1921, an amended complaint was filed alleging that the defendant had property in the State and setting forth the cause of action. The defendant answered denying the jurisdiction as before and denying that it had property within the State, and saving its right to object to the jurisdiction, again answering to the merits, With regard to the attachment it is enough to say that a third party intervened, claimed the goods and finally got judgment for them. But before that happened there was a trial on the merits between the plaintiff and defendant and a verdict for the plaintiff in 1921. The motion for judgment was delayed until May, 1924. In the same month the defendant moved to set aside the verdict and to dismiss the complaint for want of jurisdiction. The judge then sitting thought that the question of jurisdiction should be left to the decision of the Appellate Court and ordered judgment. A motion to vacate the judgment was overruled on the same ground.

Thus it is manifest that the record shows a judgment against a defendant never served with process and without any attachment of property—a judgment void upon its face unless the record discloses that the defendant came in and submitted to the jurisdiction, although not served. The record discloses no general appearance in terms, but on the contrary a continuous insistence by the defendant that it had not been brought within the power of the Court. But acts and omissions are relied upon as having the effect of a general appearance. First in order of time it is said that the petition to remove had that effect. This if true would be unjust, but the contrary is established. *General Investment Co.* v. *Lake Shore & Michigan Southern Ry. Co.*, 260 U. S. 261, 268, 269. *Wabash Western Ry. Co.* v. *Brow*, 164 U. S. 271, 279. Then it is said that pleading to the merits was an appearance, notwithstanding the effort of the defendant to subordinate its denial of the cause of action to its protest against the jurisdiction and notwithstanding the statute of South Carolina, and the order in the

case purporting to save its rights. This again would be unjust but such is not the law. *Harkness* v. *Hyde*, 98 U. S. 476, 479. *Southern Pacific Co.* v. *Denton*, 146 U. S. 202, 209. It is said that going to trial on the merits without saving an exception submitted to the jurisdiction. The plaintiff, (the defendant in error,) objects to our seeking any explanation in a bill of exceptions that he says was allowed too late, but the record shows that at the time of the trial the attachment was outstanding, not having been vacated until later, and that it no doubt may have been, as the bill of exceptions shows that it was, the expectation of the trial judge that the verdict would be satisfied out of the attached goods. The record showed the defendant's denial of the right to proceed, and the grounds for it. It was not necessary to reiterate the denial in a bill of exceptions, in order to get it on the record. It already was there.

There was some suggestion that the emphasis, at least, of the answer denying jurisdiction was on the absence of the defendant from the State and its having no property there. But the answer and the amended answer elaborately set out the motion to set aside the service and the reservation of the defendant's rights by the State judge. It seems to us impossible to doubt that this was meant to save the question and that it would be hypertechnical to require a more explicit statement that the grounds of the motion as well as the other matters mentioned were still the basis on which jurisdiction was denied. The other matters were added simply to give further force to the failure to serve within the State. We are of opinion that the record does not disclose an appearance by the defendant, or any submission to the jurisdiction that it sought and had a right to avoid.

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.